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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON,

DURING THE

. OCTOBER TERM, 1888, AND MARCH TERM, 1889.

W. H. HOLMES,
REPORTER.

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Rec. Oct. 4, 1889.

JUSTICES
OF
THE SUPREME COURT

DURING THE TERM OF THESE REPORTS.

WILLIAM WALLACE THAYER.....CHIEF JUSTICE.
REUBEN S. STRAHAN.....ASSOCIATE JUSTICE.
WILLIAM P. LORD.....ASSOCIATE JUSTICE.
W. H. HOLMES.....CLERK.

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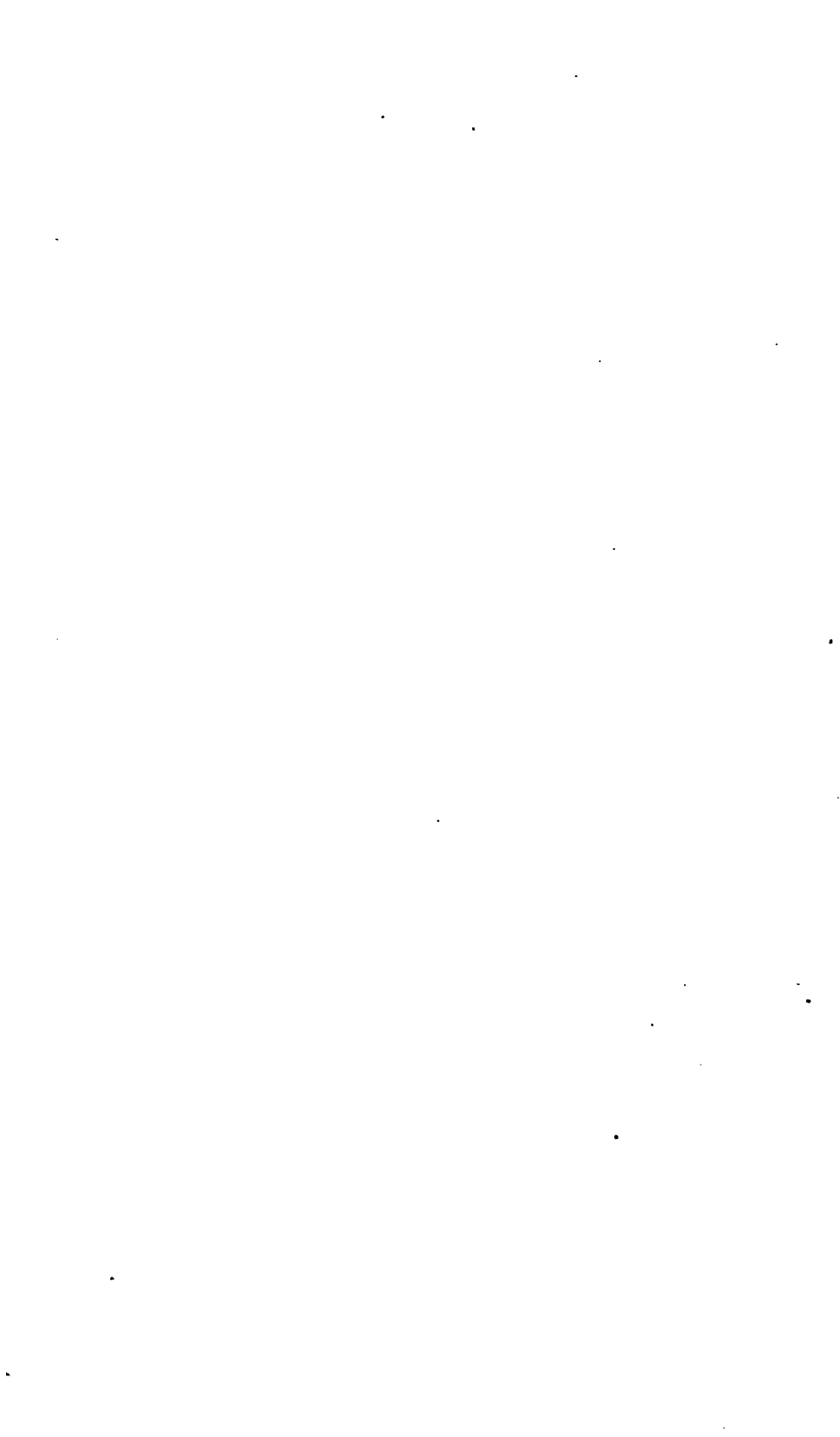
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OCTOBER TERM, 1888.



CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

OREGON.

OCTOBER TERM, 1888.

WHITE, APPELLANT, *v.* HOLLAND ET AL., RESPONDENTS.*

17	31
45	504
17	3
48	203

LEASE TO COMMENCE IN FUTURO—STATUTE OF FRAUDS.—A lease of land for a year, to commence *in futuro*, is “an agreement not to be performed within a year,” within the meaning of the statute of frauds, and must be in writing; otherwise it is invalid.

APPEAL from a judgment of the Circuit Court for Multnomah County.

On January 20, 1881, the respondents made a parol lease of certain premises to the appellant for the term of one year, to commence on March 1st, ensuing. Before the latter date, however, they disclaimed their agreement and refused to give possession. The appellant then

* This case was decided in 1884 and omitted from the report of cases. It is published here by request. — REPORTER.

Opinion of the Court—Watson, C. J.

brought this action for damages for breach of the agreement, alleging the foregoing facts in his complaint, and upon a trial by a jury, obtained a verdict for five hundred dollars. The court below set the verdict aside, and afterwards rendered judgment on the pleading for the respondents. Both these rulings were made on the ground that the parol lease was an agreement not to be performed within a year, and therefore invalid under the statute of frauds adopted in this state. This appeal was taken from such order and judgment.

A. H. Tanner, for Appellant.

William Strong & Sons, for Respondents.

WATSON, C. J.—The principal question presented by this appeal is, whether a parol lease of lands for a year, to commence *in futuro*, is “an agreement not to be performed within a year,” within the meaning of our statute of frauds, and therefore invalid. This identical question seems to have been already decided in the affirmative by this court in a previous case. (*Pulse v. Hammer*, 8 Or. 251.) The distinction which appellant’s counsel has sought to draw between the two cases is manifestly unsound.

The facts stated in the opinion in that case raise the precise question presented here, and the principle announced is equally applicable to both. But if the point could be regarded as still open, we should not hesitate to adopt the views of the court in that case as correct under the provisions of our statute. These provisions must be construed with reference to the context as it appears in the code. The code itself is an original act, and the rule of construing by the context is fully applicable. These provisions are found under the title “Of Indispensable Evidence.” They cover all the subjects usually embraced

Points decided.

in the statutes of frauds adopted in other states, and they stand in such order and connection that there is no ground for saying, as in the later decisions in New York and those of Iowa, that the declaration that "an agreement by its terms is not to be performed within a year from the making thereof is void" applies only to personal property and choses in action, and does not affect transfers or leases of realty. If this provision does apply to leases of real property in this state, and we can perceive no reason from the context from excluding them from the operation of such general language, then it will accord with all the authorities to hold the lease involved in this action invalid; for a lease for a year, to commence at a future time, is "an agreement that, by its terms, is not to be performed within a year from the making thereof: (*Wolf v. Dozer*, 22 Kan. 436; *Atwood v. Norton*, 31 Ga. 507; *Delano v. Montague*, 4 Cush. 42.)

We think, therefore, that it must be regarded as settled in this state that a parol lease of real property for a year, to commence *in futuro*, is invalid as being in conflict with such provision.

The judgment of the circuit court is affirmed.

[Filed 1888.]

ALICE B. DUBBIN, RESPONDENT, v. OREGON RAILROAD AND NAVIGATION COMPANY, APPELLANT.

RAILROAD COMPANIES.—INJURIES AT CROSSING.—CONTRIBUTORY NEGLIGENCE.

—Plaintiff attempted to pass a railroad crossing with a team and wagon. She had just observed the passenger train pass, and was not expecting any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town which she had just left. The railroad at that point cuts through a hill, so as to obstruct the view from the wagon-road. She was familiar with the crossing, having crossed there many times before, and had always used great care in looking for trains.

17	5
34	219
34	227
17	5
40	8
40	72
17	5
48	14
17	5
48	315

Opinion of the Court—Lord, C. J.

On this occasion she did not stop to look or listen; her team came into collision with a passing engine, and one horse was killed and the wagon was overturned. *Held*, that plaintiff was guilty of contributory negligence.

APPEAL from the Circuit Court for Baker County.

Olmstead & Anderson, Dolph, Bellinger, Mallory, and Simon, for Appellant.

Hyde & Hyde, and A. J. Lawrence, for Respondent.

LORD, C. J.—This was an action to recover damages for the alleged negligence of the defendant in running a train of cars against the horses hitched to the wagon in which the plaintiff was crossing the defendant's track. At the trial, when the plaintiff rested her case, the defendant moved for a nonsuit, which the court overruled, and the defendant excepted. It is enough to say that a verdict was returned for the plaintiff, and that the present appeal brings up the judgment rendered thereon, and the record of the proceedings upon the trial.

The main contention is confined to the error assigned,—in not granting the motion for a nonsuit. This is claimed upon the ground that, from the evidence submitted by the plaintiff, it clearly appeared that it was the negligence of the plaintiff which occasioned the collision and caused her injury. The evidence of the plaintiff shows that she and Mrs. Huntington, and a child of the latter, left the town of Huntington with a team and express-wagon to visit some friends in the country, and that after they had traveled west a couple of miles or so, the west-bound passenger train came along and passed them; that as she left Huntington she saw standing on the track a freight train headed west, to which engines were attached, with steam up, but that, after the passenger train had passed, she thought nothing more of any trains coming; that in driving around the point of the hill or moun-

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tain through which the railroad is cut, and across which the county road runs diagonally, and just as she was crossing the railroad track, and the front feet of the horses had reached the rail, she saw the engine approaching, not more than the length of a rail distant; that she tried to back the horses, but that before she could make them back, the train struck the horses, killing one and overturning the wagon. Her testimony also shows that she had traveled over the crossing many times a year for several years, was familiar with the place and its surroundings, knew the view was obstructed on account of the intervening hill, and regarded the crossing, under the circumstances of its situation, as so dangerous that she had always before stopped and listened, and if she did not hear the train, she or some companion for her went forward and looked up the track before venturing to cross it. She says, in reply to the inquiry whether "she had ever taken any pains to find out whether trains were passing," that "I have got down when I was passing alone and tied my horses, and went and looked, and at other times, if any one was with me, I got them to hold the team, and went and looked, or got them to go and look for me," and that she "always regarded it as a dangerous place." "The reason I did not get down and examine the track this time as I had done before was, that the passenger train had gone by, and I was not expecting any train from Huntington, and I knew it was not time for the helper to go down until the passenger train had got to Weatherby."

It is clear and undisputed that neither the plaintiff nor Mrs. Huntington listened, on approaching the crossing, to find out whether a train was coming, notwithstanding they knew the view of the track was obstructed, and that the crossing, by reason of the nature of the cut, and the location of the county road across it, was more than ordinarily dangerous, but drove directly on the track without

Opinion of the Court.—Lord C. J.

thinking anything about it, or observing the usual precautions required for safety, because the passenger train had passed them, and the plaintiff did not think any other train was coming. There is no doubt, if she had listened, she could have heard the approach of the train, and avoided the accident. But it is sought to discriminate this case from the general rule applied to travelers in approaching railroad crossings, and to excuse the failure or neglect of the plaintiff to listen, on the ground that the evidence showed that she knew the time of the running of the trains, and as the passenger train had passed them, she knew no other train would be due for some time, and consequently the fact whether her failure to listen under the circumstances was such contributory negligence as should defeat her recovery was for the jury to decide.

The law assumes that there is danger at railroad crossings, which, to avoid, requires the exercise of care and prudence commensurate with the nature of the place or risk involved. It is laid down by the courts and text-writers, when one approaches a point upon the highway crossed by a railroad track, it is his duty, whether on foot or in a wagon, to exercise a care for his own safety, and especially to look and listen before attempting to cross it.

"The rule is well established," said Miller, J., "that it is the bounden duty of a traveler approaching a railroad crossing, before he passes over the same, to exercise a proper degree of care and caution, and to make a vigilant use of his eyes and ears, for the purpose of ascertaining whether a train is approaching; and if by proper use of his faculties he could have discovered the train and escaped injury, and fails to do so, he is chargeable with contributory negligence, and no recovery can be had." (*Salter v. Railroad Co.*, 75 N. Y. 317.)

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“He must assume,” says Mr. Beach, “that there is danger, and act with ordinary prudence and circumspection upon the assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term ‘ordinary care under the circumstances’ shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings as affecting the traveler is no longer a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all courts enforce this reasonable rule.” (Beach on Contributory Negligence, sec. 63, and authorities cited in note, and also sec. 9.) Nor will the fact that a train is behind time relieve the traveler of the duty of care and caution; railroad companies have the right to run trains at all times, and those having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular or extra trains are put on.

“Assume in this case,” said Harris, J., “that it was negligence in the railroad company to be behind time, and will this in law excuse the defendant from observing care on his part? In my opinion, it will not. Such a rule would be extremely dangerous, and there would be much difficulty in its application. It may be that those who live in the immediate vicinity of railroads, and who frequently cross them, may, when they suppose a train has just passed, be less careful, and this may grow into a habit, or they may consult time-tables, and from them reason that there can be no locomotive near, and act without regard to care; but if they do so, in

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my opinion they act at their peril. They will be charged with negligence in case they rush on the track without looking, or trying in a proper way to ascertain the fact whether danger is near, and they will not be permitted to recover damages for any injury they sustain." (*Dascomb v. Railroad Co.*, 27 Barb. 226.)

So that it seems that though a person or traveler may know the usual time of the running of different trains, from the fact that they may know that a train has passed, and that another train will not be along for some time according to their information or the time-table, it does not relieve him of the duty of observing care and prudence, or of using his faculties when he approaches and attempts to cross a railroad track. The law requires of him to make a reasonable use of his senses, and if the view of the track is obstructed, he must use his sense of hearing, and if he neglects to do so, and a collision results, he suffers by consequence of his own negligent act, and is not entitled to recover. He who fails to exercise this precaution when there are no circumstances to disturb his judgment, or impede his action at the time, is not using ordinary care.

It has been said: "The track itself is a warning of danger, and I think it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and if either cannot be rendered available, the obligation to use the other is the stronger, to ascertain, before attempting to cross it, whether the train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the

Opinion of the Court—Lord, C. J.

courts as matters of law.” (Christian, J., in *Railroad Co. v. Miller*, 25 Mich. 290.)

“As the plaintiff could not use his eyes with effect,” said Crockett, J., “it was incumbent on him, as a person of ordinary prudence, to make the best use of his ears, which he could not do while his team was in motion. Upon the plaintiff’s statement of the facts, we hold that he was guilty of contributory negligence in failing to stop his team to listen for an approaching train.” (*Flemming v. Railroad Co.*, 47 Cal. 256.)

“But aside from this fact,” said Field, J., “the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others.” (*Railroad Co. v. Houston*, 95 U. S. 697.)

“A railroad crossing is a place of danger, and common prudence requires that a traveler on the highway as he approaches one should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless.” (*Allen v. Railroad Co.*, 105 Mass. 79.)

Again, it is said that a traveler should always approach a railway crossing under the apprehension that a train is

Opinion of the Court — Lord, C. J.

liable to come at any moment; and while he may presume that those in charge of it will obey the law by giving the signals, the law will nevertheless require that he obey the instincts of his self-preservation, and not thrust himself into a situation which, notwithstanding the failure of the railroad, he might have avoided by the careful use of his senses. (*Railroad Co. v. Butler*, 2 N. E. Rep. 138. See also *Railroad Co. v. Richter*, 34 N. J. L. 180; note and case cited on page 226, 2 Am. & Eng. R. R. Cas.; *Payne v. Railway Co.*, 13 Lea, 522; *Scharfuth v. Railway Co.*, 62 Iowa, 624; *Heize v. Railway Co.*, 71 Me. 636; *Railroad Co. v. Beale*, 73 Pa. St. 504; *Railroad Co. v. Clarke Com.*, 73 Me. 168; *Haas v. Grand R. R. Co.*, 47 Mich. 401; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Railroad Co. v. Adams*, 33 Kan. 427; *Railroad Co. v. Ritchie*, 102 Pa. St. 425; 9 Am. & Eng. R. R. Cas. 261; 1 Thompson on Negligence, 424, 426, and cases cited.)

It thus appears to be a duty imposed by the law upon a person about to cross a railroad to use his eyes and ears,—to look out for sign-boards and signals, and to listen for bell and whistle,—and if the view of the road is obstructed, it does not relieve him of the obligation to listen and ascertain if he can whether there is an approaching train. Nor will the fact that the train is behind time (*Salter v. Railroad Co.*, 75 N. Y. 273; *State v. Railroad Co.*, 47 Md. 76), or that it was a special train (*Schofield v. Railroad Co.*, 114 U. S. 615), or the failure of the railroad to give the signal of its approach at the crossing (see case *supra*), excuse the non-performance of this duty.

In many of the cases, the measure of duty goes to the extent of requiring the traveler to stop, in order to look or listen, but he is not required to get out of his wagon, and go forward on foot, for the purpose of looking (*Stakus v. Railroad Co.*, 79 N. Y. 467; *Davis v. Railroad Co.*, 47 N. Y. 400; *Railroad Co. v. Wright*, 80 Md. 182), unless

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there are some particular circumstances requiring it. (*Railroad Co. v. Beale*, 73 Pa. St. 509.) Now, the plaintiff was a competent person to take care of herself, was familiar with the road and its intersections with the railroad, and fully understood, from the obstructed view, the danger and risk incurred in attempting to cross it without listening. There is no pretense that her team was or became unmanageable or unduly excited, or that there were any circumstances embarrassing or perturbing her judgment, or that she was in the presence of any entangling influences or conditions to perplex or confuse her mind. She was in the full possession of all her faculties, and if she had listened, could have heard the train, yet, relying on the fact that the passenger train had passed, and that no other train was due for some time, she relaxed her vigilance, and drove on the track, and in collision with the train. "If the obstruction had been such," said Johnson, J., "as to prevent her from seeing the track or train, then, in the exercise of ordinary care, she should have listened for the train." (*Railroad Co. v. Adams*, 33 Kan. 431.) Upon this state of facts, what doubtful or qualifying circumstances does the conduct of the plaintiff present which excuses her from the plain consequences of her negligent acts? The only duty which the law imposed for her own safety, as well as the lives of passengers on trains, she neglected and disregarded under circumstances which demanded the exercise of prudence and caution.

It is true that negligence is ordinarily a question of fact for the jury to determine, from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional, and confined to those, as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent.

Points decided.

In such cases, when the measure of duty is defined by law, then, says Mr. Beach, "a failure to attain the standard is negligence in law, and a matter with which a jury can properly have nothing to do. This is the principle upon which *Cogswell v. O. & C. R. R. Co.*, 6 Or. 417, was decided by Boise, J." (Beach on Contributory Negligence, sec. 163.)

We think, upon the undisputed facts of this case as made by the plaintiff, her own negligent act contributed to produce the injury which she sustained by the collision, and that the motion for nonsuit ought to have been allowed. It follows that the judgment must be reversed, with directions that a judgment for nonsuit be entered.

[Filed 1888.]

SHADDEN v. HEMBREE. PARRIS v. HEMBREE.
HEMBREE v. SHADDEN.

WILLS — CONSTRUCTION — INTENTION OF TESTATOR. — In the construction of a will, under the laws of this state, due regard must be had to the directions contained therein, and to the true interests and meaning of the testator in all matters relating thereto; and when a clause in the will provides, in general terms, for the limitation over of the devise to a second taker upon a contingent event, the intention of the testator, as indicated by all the parts of the will, must determine when and under what particular circumstances the contingency arises.

CONSTRUCTION — NATURE OF ESTATE. — Where H. made his will, in which he devised his farm to his son, and certain town property to his wife, and directed that the wife should have the use, control, and management of all his property, both real and personal, during her natural life, or so long as she remained his widow, and then it should go to the son, except as therein provided; and by a subsequent clause in the will it was directed that, in the event that his wife and son should both die before the son became twenty-one years of age, then that his real estate should descend to his nephew, to whom he devised it in the event mentioned, and that his personal property should be divided among the brothers and sisters of himself and wife: *held*, that the will created a life estate in the wife, remainder

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in the son, and a limitation in the nature of an executory devise in the nephew; and that upon the happening of the contingency upon which the limitation over to the nephew was made to depend, the title of the real property vested in him, or in his heirs in case of his death; *held, further*, however, that the clause in the will creating the contingency must be construed with reference to other parts of the will; and if it appeared therefrom that it was the intention of the testator that the limitation over was only to take effect in the event of the wife and son dying within the time referred to, and of the nephew being alive, to take the property at the time of the death of the wife, the will should be construed in accordance with such intention.

Id. — And where it appeared that the nephew died first, the wife subsequently, and that the son survived the latter, *held*, that the contingency upon which the limitation depended did not happen, that the son took the real property in fee, and upon his death, it descended to his heirs, under the laws of the state governing descents, and that the heirs of the nephew had no claim upon it.

CONSTRUCTION — NATURE OF ESTATE — CONTINGENT REMAINDER. — *Held, also*, that if the limitation over had been by way of contingent remainder, instead of executory devise, the result would have been the same; that they both depend upon a contingency which must occur before they can take effect, and that when the happening of the contingency becomes impossible, the estate in the first taker, under the will, becomes absolute.

DESCENT AND DISTRIBUTION — DESCENT OF PROPERTY TO GRANDPARENTS. — *Held, also*, under the particular circumstances of these cases, that the son having died leaving no child, wife, father, mother, sister, or brother, or issue of any brother or sister, the estate descended to his grandmother on his father's side, and his grandfather and grandmother on his mother's side, in equal shares to each.

APPEAL from the Circuit Court for Lane County.

Washburn & Woodcock, and *L. Bilyeu*, for Respondent.

Fenton & Fenton, and *J. E. Fenton*, and *McCain & Hurley*, for Appellant.

THAYER, J.—These three cases, two of them appeals from the circuit court for the county of Lane, and third an appeal from the circuit court for the county of Yamhill, involve the construction of the last will and testament of Lycurgus Hembree, of which the following is the substance:—

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“First. It is my will that all my just debts be paid. •

“Second. I give and bequeath to my son, Henry L. Hembree, my farm, known as the ‘Green B. Hayes donation land claim,’ in Lane County, Oregon. •

“Third. I give and bequeath to my beloved wife, Mary M. Hembree, my town property in the town of McMinnville, in Yamhill County, Oregon, one block and a half, situated in Rowland’s Addition to the said town.

“Fourth. It is my will that my beloved wife shall have the use, control, and management of all my property, both personal and real, during her natural life, or so long as she remains my widow, and then the said property shall all go to my son, Henry L. Hembree, except as herein provided.

“Fifth. I give and bequeath to my nephew, Frank M. Shadden, one tenth of all my personal property outside of my real estate, the said one tenth to be given to him when he is twenty-one years of age.

“Sixth. It is my will that in the event that my beloved wife and son, Henry M. Hembree, shall die before my son shall become twenty-one years of age, that it is my will that my real estate shall descend to my nephew, Frank M. Shadden, and in the event mentioned, I do so will and bequeath the same to him; and it is my will, further, in the event just mentioned,—the death of my wife and son,—that all my personal property shall be equally divided; one half descend to my brother, I. N. Hembree, my sisters, Louisa Preston, and Lousetta Preston, and Elizabeth A. Montgomery, each to have equal shares, and the other half to my beloved wife’s brothers and sisters, each to have an equal share.

“Seventh. It is my will and earnest request that my son, Henry L. Hembree, be thoroughly educated, so far as he will receive an education.

“Eighth. I hereby appoint my beloved wife my sole

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executrix, and it is my will and request that she be not required to give bonds in administering on my estate.

“In witness whereof, I hereunto set my hand and seal this eighth day of November, A. D. 1875.

“LYCURGUS HEMBREE. [Seal.]”

The testator died March 31, 1876, leaving his wife and son surviving. The will was duly admitted to probate July 3, 1876, and thereupon the executrix named therein duly qualified. The said Frank M. Shadden, named in said will, died in September, 1879, leaving his sister, Ellen Bell, his only heir at law.

The said Mary M. Hembree, widow of said testator, died July 4, 1880, leaving the said Henry Leon Hembree her only heir at law; and the said Henry Leon Hembree died on the thirty-first day of March, 1884, leaving his grandmother, Malinda Parris, on his father's side, and his grandfather and grandmother, T. J. Shadden and Martha Shadden, on his mother's side; also said I. N. Hembree, Louisa Preston, Lousetta Preston, and Elizabeth A. Montgomery, his uncles and aunts, on his father's side; and also certain uncles and aunts on his mother's side; but he left no wife nor child, and died a few months before he had reached the age of twenty-one years.

The administration upon the estate was closed November, 1885, and the real property mentioned in the will, or the greater part thereof, relieved therefrom.

It seems that the main contention in regard to the property is between the brothers and sisters of the testator on the one side, and the grandparents of said Henry L. Hembree, and those claiming under them, on the other.

The Yamhill County case was an action by the appellant therein, I. N. Hembree, to recover the possession of the block in the town of McMinnville mentioned in the will. This was the commencement of the litigation involved therein.

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The said I. N. Hembree alleged in his complaint that he and the three sisters named were the owners each of an undivided fourth interest in said premises as tenants in common; that he was entitled to the possession thereof; and that the respondent, Henry C. Shadden, wrongfully withheld the same.

The said respondent denied the allegations of the complaint, and alleged title in fee to the premises in himself, claiming under the said will of Lycurgus Hembree remotely, and directly under a will of said Mary M. Hembree. The action was tried before Hon. R. P. Boise, judge of the circuit court for that county, upon an agreed statement of the facts.

Said court found that, under the provisions of the said will of Lycurgus Hembree, the said premises, on the death of said testator, became vested in the said Mary M. Hembree for life, remainder to said Henry L. Hembree, and a contingent estate therein to said Frank M. Shadden; and that, upon the death of the latter, his contingent estate lapsed, and vested in Henry L. Hembree; and upon the death of Mary M. Hembree, the whole title vested in him; and that upon his death, it vested in the said three grandparents in common, one third to each. Subsequently, the Lane County cases were commenced.

The appellants Henry C. Shadden and Malinda Parris brought separate actions to recover the possession of undivided portions of the said Green B. Hayes donation land claim. Said Henry C. Shadden claimed an undivided two-thirds interest therein under a deed to him from the said Thomas J. Shadden and Martha Shadden, executed on the twenty-fourth day of April, 1886, and the said Malinda Parris claimed an undivided one-third interest therein as heir at law of the said Henry Leon Hembree.

The respondent, said I. N. Hembree, defendant in each of said actions, claimed therein that he and his aforesaid

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sisters were owners in fee of the said donation claim as tenants in common, each of an undivided fourth interest. Said action was tried before the Hon. R. S. Bean, judge of the circuit court for Lane County, without a jury, who found that the title to the land claim, on the death of Lycurgus Hembree, under the provisions of said will became vested in Mary M. Hembree for her life, defeasible on her marriage, with a vested remainder in fee in Henry L. Hembree, coupled with a conditional limitation; that on the death of said Mary M. Hembree, said Henry Leon Hembree took the title to said premises in fee, coupled with a conditional limitation; that on the death of said Henry Leon Hembree, the title to said premises became vested in the heirs of Frank M. Shadden.

The learned judges of the respective circuit courts evidently undertook to construe the will in question by applying the technical rules of the ancient common law. The one appears to have viewed the instrument as having created in the nephew, Frank M. Shadden, an estate known as contingent remainder, and the other seems to have regarded it as an executory devise, though he uses the term "conditional limitation." And the counsel in the case appears to apprehend that, if the provision in the will in favor of the nephew is construed to be a limitation of an estate to him in the nature of a contingent remainder, the devolution of the estate would be materially different than if construed to be a limitation in the nature of an executory devise. Hence the controversy thus far has mainly involved that question.

Such limitations formerly occupied a prominent place in the divisions of real property into estates. A retrospective view of the customs and laws of our English ancestors in conveying and transmitting real property inclines one to the belief that a grant or devise in that age would not have been regarded in good taste unless so

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complicated with conditions and limitations that none but the astute could understand it. Latterly, however, a more simple and practical course in such affairs has been pursued, and the usage of annexing qualifications and contingences calculated to vest, enlarge, or defeat the title dispensed with. This change of custom, I conceive, has also had the effect to incline the courts in construing instruments employed to transfer landed estates to attach more importance to the intention of the parties thereto, though in the interpretation of a devise the intention of a testator always had an important bearing. It was deference to such intention which induced the courts to invent the species of estate known as "executory devise." It differs from a contingent remainder in only a few particulars. It needs no particular estate to support it; a fee-simple or other less estate may be limited on a fee-simple, and a remainder may be limited on a chattel interest after a particular estate for life is created in the same. If the courts had adhered to strict common-law rules, no such estate would ever have been known, unless provided by the proper law-making power.

It is a mistake to suppose that because some particular provision in a will, literally interpreted, would create a certain kind of estate, either present or in expectancy, that therefore the courts must necessarily determine it to be such estate, and construe the instrument accordingly. Our statute provides that "all courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true interests and meaning of the testator in all matters brought before them." (Code, sec. 3097.)

Chancellor Kent says that "the intention of the testator is the first and great object of inquiry, and to this object technical rules are, to a certain extent, made subservient. The intention of the testator, to be collected

from the whole will, is to govern, provided it be not unlawful or inconsistent with the rules of law." (4 Kent's Com. *534.)

The testator in this case evidently intended that his son should have the farm in Lane County, and be his residuary legatee, and that his wife should have, during her life, his town property in the town of McMinnville. The second and third bequests in the will were absolute gifts to the son and wife severally of the respective parcels of real property therein referred to, and if there had been no other provisions in the will indicating a different intent, they would each have taken an absolute estate therein.

But the fourth and sixth clauses in the will clearly indicate a contrary intent as to the wife. By the fourth clause he gave her the use, control, and management of all his property, both real and personal, during her natural life; and directed that, upon her death or marriage, it should all go to the son, except as otherwise provided in the will. This exception, I think, refers to the third clause in the will, containing the bequest to the wife of the property, and to the sixth clause thereof, in which it is directed that in the event of the death of the wife and son before the son became twenty-one years of age, the real estate should descend to the nephew, and the personal property should be equally divided, etc.

These various provisions indicate that the gift to the wife of the town property was intended to be only for her life, and that her use, control, and management of the other property would continue no longer than she remained the testator's widow. I think he intended, however, that she should retain the town property during her life, even if she ceased to remain his widow, but that the title thereto should terminate at her death.

The main difficulty in the way to an understanding of

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the will is, to ascertain from the inconsiderate language employed in the sixth clause thereof what limitation the testator intended to attach to the devise to his son. If it depended alone upon the question as to whether the limitation was a contingent remainder or an executory devise, it could be easily determined.

A remainder, says a distinguished law-writer, "is defined by Lord Coke (1 Inst. 143 a) to be a remnant of an estate in lands or tenements expectant on a particular estate created together with the same at one time. It follows," he says, "from this definition, that whenever the first fee is limited, there can be no remainder, in the strict sense of the word, for the whole being first disposed of, no remnant exists to limit over. The true point of distinction, as I take it," he says, "between such conditional limitations over as are and such as are not remainders, in the strict sense of that word, lies here: the former are limited to commence where the first estate is, by the very nature and extent of its original limitations, to expire or determine; whereas the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession upon an event which may happen before the regular determination to which the first estate is liable, from the nature of its original limitation, and so to rescind it. And in the latter case, I apprehend it is the same thing whether the whole fee is disposed of in the first limitation or not." (Fearne on Remedies, 4th Am. ed., from 10th Lond. ed., 11-13.) In connection with this, the author gives in substance the following illustration: If an estate is limited to the use of A and his heirs till C returns from Rome, and after the return of C, to the use of B in fee, the whole fee being first limited to the use of A, there is no remnant left to limit over, and consequently the limitation to B cannot be a remainder. But where an estate is limited

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to the use of A until C returns from Rome, and after the return of C, to the use of B in fee, here the whole fee is not limited to the use of A, but only a particular estate, to endure till the return of C, which being an uncertain period, such particular estate is a freehold.

Only a particular estate having been limited, extending in its first creation no further than to C's return, the residue of the estate after his return is a remnant of the whole estate in the lands, expectant on that particular estate, which remnant being limited to the use of B, it is a remainder.

There are minor points of difference between a remainder and an executory devise, but they all proceed from the main distinction, as above shown. The consequence resulting therefrom is, that in a devise a fee may be limited to commence *in futuro*, while in a deed it is not permissible. In the present case, the limitation to the son was of an absolute estate. His dying before he reached the age of twenty-one years was the contingency which was to operate to defeat it, in the event the mother also died within that time, and to vest it in the nephew. It could not therefore have been a remainder under the rules of the common law. But I do not see that it makes any difference with the rights of the parties herein which sort of estate it belonged to.

I do not think the theory of counsel that the will created a life estate in the mother, a vested or contingent remainder in the son, a contingent remainder in the nephew, and that when the mother died the whole estate passed to the son, and thereby destroyed the remainder over to the nephew, is tenable. Contingent remainders might be destroyed by some ulterior act, such as the tenant in an estate-tail suffering a common recovery. But they were not suicidal; some extraneous force beyond the regular happening of the contingency had to be employed to

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accomplish their destruction. The counsel's theory proves too much.

If, by the terms of the will, the son, upon the death of the mother, became vested with an absolute estate, then, as shown by Mr. Fearne, there could have been no contingent remainder to the nephew, as there was no remainder left to limit over to him. If the nephew, therefore, took any estate under the will, it must have been by way of executory devise. But whichever estate it was, under the view indicated, is immaterial. The one was as effectual to create an estate in Frank M. Shadden as the other, and in itself as endurable. Counsel's contention, therefore, as to which character of estates the limitation to the nephew belonged, is an attempt to make a distinction without a difference.

It is apparent, to my mind, that the language of the sixth clause of the will created an executory devise. It was the limitation of a fee upon a fee, and the only question in the case to be determined is as to what contingency the testator intended to limit upon. The view that the legacy lapsed upon the death of the nephew cannot be maintained. The limitation to the nephew was to prevent the legacy from lapsing. A legacy lapses when the devisees die before the testator, and there is no other person authorized to take it under the will. Nor would the death of the nephew destroy the limitation over, if the contingency occurred limiting the estate to him. In that event it would go to his heirs whenever the contingency did happen, although it might in the mean time have descended to the heirs of the first taker. (*Barnitz's Lessee v. Casey*, 7 Cranch, 456.)

The said sixth clause of the will must be read in connection with the second and fourth clauses thereof. Taken together, they are to the same effect,—that the son is given the farm in Lane County specifically, and the mother to

have the use, control, etc., of all the property during her natural life, or so long as she remained the testator's widow, and then it is to go to the son, except that in the event of the death of both wife and son before the latter becomes twenty-one years of age, the real estate is to go (descend) to the nephew, and the personal property be equally divided, etc.

There is a large class of cases in which it is held that where there is a devise to one person in fee, and in case of his death to another, the contingency referred to is the death of the first-named devisee during the life of the testator, and that if such devisee survives the testator, he takes an absolute fee; that the words of the contingency do not create a remainder over, to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary, and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator; that such is the settled rule where other parts of the will, aside from the words of absolute gift, followed by a gift over in case of death, or death without issue, do not indicate a contrary intention. (*Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Vanderzee v. Slingerland*, 103 N. Y. 47; 8 N. E. Rep. 247; *In re Railway Co.*, 105 N. Y. 89; 11 N. E. Rep. 492.) In the last two cases, however, the court found, in the context of the will, indications of intention which took them out of the operations of the rule.

In *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. Rep. 291, the same rule was recognized, but the court there held that the circumstances indicated the death of the first taker at any time, whether before or after the death of the testator, and held that when the death of the first taker was coupled with other circumstances, the devise over, unless controlled by other provisions of the will,

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took effect, according to the ordinary and literal meaning of the words, upon death at any time. (112 U. S. 532, 533; 5 Sup. Ct. Rep. 294.) I cannot think that the devise over to the nephew in this case was intended to be dependent upon the contingency of the son's dying during the life of the testator, though there may be nothing in the context of the will showing to the contrary, nor any reason why it does not come within the rule laid down in the above cases. I cannot see how the testator could have apprehended the happening of the contingency within his lifetime. But the will cannot, it seems to me, be read without the impression that he only intended to give the property to the nephew in the event that the latter survived the son. It is very evident that if he had conceived the idea that the son would survive the nephew, the limitation would not have been created. It would be preposterous to suppose that the testator had in view any direct intention of changing the course of descent of his property, or that he would have inserted the provision included in said sixth clause of the will if he had anticipated the sequel. It is clearly manifest from that instrument that the testator intended that his property should go to his son, if alive at the death of his wife; and that if he should die before he became twenty-one years of age, and the wife should also die within that time, it should go to the nephew; and that the limitation to the latter was a mere alternative.

The testator would not certainly have created it if he had not expected that the nephew would be alive when the contingency happened. There is no reason shown or circumstances indicating why the property should have been intended for the nephew dead any more than for the son dead. If the testator had desired it to go to the heirs of the former, he would very likely have had them nominated in the will, although it were not strictly

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necessary in order to pass the fee. The devise to the nephew was evidently intended as a personal bequest to him alone, prompted, as it would seem, by some special regard which the testator entertained for him, next to that which he had for his son. The intention which the testator had in mind in regard to the affair is obvious. The wife was to have the use, control, and management of the property during her life, if she remained his widow; then it should go to the son, if alive, but if he were dead, and had not become twenty-one years of age at the time of his death, and the death of the wife also occurred before the son would have reached that age, the nephew should be substituted in place of the son, and receive the legacy. It was intended that the legacy should be given the nephew only in case the mortality of the three took place in the inverse order from which it occurred in fact.

The limitation to the nephew was in the event that the son died first, the wife subsequently, and they both died before the son would have arrived at the age of twenty-one years, if he had lived. The case is very analogous in principle to that of *Wolfe v. Van Nostrand*, 2 N. Y. 436. There a testator gave his personal estate to his wife, also his real estate in fee, except two lots of land in the city of New York. Those parcels he devised to his wife for life, and after her death, in case his daughter Elizabeth (his only child) should die without having married, or without leaving any child or children, one parcel to his nephew William, and the other to his nephew Henry. The daughter survived the mother, but afterwards died without issue. *Held*, that by the will the nephew took contingent remainder in fee, which would take effect only in case the daughter died childless during the life of the widow; that the daughter in the mean time took the fee by descent; and on her surviving the widow, that the remainder fell, and she became entitled to the prem-

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ises absolutely. This case, so far as the construction of the will in question is concerned, is an authority in favor of the view herein expressed. The court, however, appears to have been impressed with the belief that there was an important difference between the effect of a limitation by way of a contingent remainder and a limitation by way of executory devise.

The learned judge who delivered the opinion of the court, after referring to the fact of the plaintiff's holding that the nephew took a contingent estate by way of executory devise, of such a construction operating to the injury of the daughter, by cutting down, in effect, her estate from a fee to an estate for life, and against the supposition that the testator intended to benefit the devisee, to the prejudice of his only child, says:—

“Again, the construction of the plaintiff is met and opposed by an inflexible rule of law that a future interest capable of taking effect as a contingent remainder shall never take effect as an executory devise. (Butler's *Fearne on Remedies*, 387, and note.) The limitation to William Newton could take effect as a remainder according to the view suggested. . . . In a doubtful case we ought rather to incline to the construction that will give effect to the devise according to the rules of the common law than that which requires a resort to the extraordinary methods of executory devise.”

What difference the learned judge supposed existed between the effect of the respective limitations, I am unable to perceive. He demonstrates in the opinion that the testator in the will intended that the contingency upon which the estate was limited to the nephew—the daughter's dying childless—must take place previous to the death of the mother, and he construed the will in accordance with such intention. Read in the light of surrounding circumstances, it had to be interpreted the

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same as though it contained an express provision to that effect.

The estate, therefore, would not vest in the nephew unless the contingency happened as mentioned. How, then, could it make any difference whether the limitation over was a contingent remainder or an executory devise? The contingency would not arise in either case unless the daughter died childless before the mother; and as the former outlived the latter, the event upon which the estate was to pass to the nephew never happened, and after the death of the mother, became impossible. The limitation over was defeated, and the estate necessarily remained in the daughter and her heirs. So, also, in this case, if the event provided in the will as the termination of the estate in Henry L. Hembree, and the vesting of it in Frank M. Shadden, never occurred and can never occur, the estate must remain forever in the heirs of the former.

In the two cases given by Mr. Fearne illustrating where a limitation over is a contingent remainder, and when the limitation over can only take effect as an executory devise,—the one where there is a limitation to the use of A until C returns from Rome, and after his return, to the use of B in fee, which created a contingent remainder in B; the other where the limitation is to the use of A and his heirs till C returns from Rome, and after his return, to the use of B in fee, which, being an attempt to limit a fee upon a fee, could only take effect as an executory devise,—they both, I apprehend, would stand upon the same footing should C die at Rome, thereby rendering his return an impossibility. That occurrence would unfetter the estate, and the remainder would fall, and the devise over fail.

If I am correct in the view that Lycurgus Hembree intended that the property in question should go to Frank

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M. Shadden only in event that Henry L. Hembree died during the life of his mother, and that Shadden should be living at the time of the occurrence, then the contingency upon which the limitation over was made to depend never happened; and whether the limitation over was a contingent remainder or an executory devise is of no consequence, as neither could ever become operative unless the event transpired upon which it was made to depend. Under that view, the said property would not go to the heirs of the nephew, but to the heirs of the son. As to who are the heirs of the latter, presents another question for our consideration. The finding of Judge Boise upon that question, as before mentioned, is supported by *Knapp v. Winsor*, 6 Cush. 156. The supreme court of Massachusetts in that case, in a well-considered opinion delivered by Chief Justice Shaw, held, under a very similar state of facts, that the property went to the grandparents equally; and as the counsel before the court seem to regard that as the correct rule, we are inclined to hold on these appeals accordingly.

Since the foregoing was prepared, Messrs. Washburn, Woodcock, and Bilyeu, counsel for said I. N. Hembree, have furnished the court a brief containing a very able and exhaustive argument in favor of the construction given to the will by the learned judge of the circuit court for the county of Lane. The views of the council upon the question are in harmony with those herein expressed, with the exception that they claim, in effect, that upon the death of the wife and son before the latter became twenty-one years of age, the legacy went to the heirs of the nephew without regard to the relative times of the death of the wife and son, and irrespective of the fact that the nephew himself died long before either of them.

If we were able to conclude that such was the intention of the testator, we should feel compelled to adopt that

Points decided.

view; but the cogent reasons before enumerated convince us that the devise over to the nephew was only intended to take effect in event the son died and the former was left, in which case he would take directly at the death of the wife what otherwise would have gone to the son; that he, if living, would have taken the place of the son dead, but under no other circumstances.

[Filed July 2, 1888.]

CHARLES A. COGSWELL, RESPONDENT, v. HENRY
C. WILSON, APPELLANT.

EQUITY — PURCHASER OF INTEREST OF PARTNER IN COPARTNERSHIP PROPERTY MAY MAINTAIN SUIT TO HAVE SAME DECLARED. — The purchaser of partnership property at a sale upon an execution against an individual member of a copartnership firm is entitled to maintain a suit in equity, against the other member or members of such firm, to have the extent of his interest in the property purchased ascertained and declared, and to recover such interest, either by having a due part of the property set over to him, or a due proportion of the proceeds of the sale of it, paid over to him, or he may recover a personal decree in the suit in a proper case for the value of such interest.

ATTACHMENT — WRIT OF — WHAT LEVIABLE UPON. — A writ of attachment or execution against an individual member of a copartnership can only be levied upon his interest in the partnership property in the same manner as levies are made upon individual property by virtue of such writs.

ID. — EFFECT OF LEVY CONSIDERED AND DETERMINED. — Where a sheriff, under a writ of attachment against an individual member of a copartnership firm, made return to the writ that he had executed it by attaching all the right, title, and interest which the defendant had in and to the copartnership property of the firm; that he also took into his possession certain described personal property of such copartnership, consisting of two thousand six hundred head of sheep, more or less, and certain other animals, and that he served a copy of the writ upon the defendant, upon which copy was inclosed a notice that he had attached all the right, title, and interest of such defendant in and to the copartnership property, and transmitted another copy of the writ, with a like indorsement to the other member of the firm: *held*, that such service and levy were only effectual as to the sheep and other animals which the sheriff seized and took into his possession; that it did not bind any other of the copartnership prop-

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erty as to authorize a sale of it upon execution issued upon a judgment which directed that the property theretofore attached in the action be sold, as by law provided, to satisfy the plaintiff's demand therein.

APPEAL from a decree of the Circuit Court for the county of Lake.

N. B. Knight, for Respondent.

F. W. Ewing and *G. G. Bingham*, for Appellant.

THAYER, J.—The appellant and one D. R. Jones, on the nineteenth day of June, 1875, entered into written articles of copartnership. By the terms of the articles, they were to engage in the sheep-raising business, to be carried on at Warner Lake, Grant County, Oregon. The appellant was to furnish two thousand sheep (or more, as might be agreed upon) for the use of the copartnership, at the rate of three dollars and fifty cents per head. Jones, after fifteen hundred dollars was taken from the half-value, was to give his note to appellant for the remainder of one half the sheep at the same valuation; said note was to draw interest at the rate of one per cent per month until paid; appellant was to make such payment on lands that said copartnership might purchase from the state of Oregon as university lands, or from the Oregon Central Military Road Company (if such lands were purchased), which purchase might be at the discretion of both parties; the appellant was to make such payment on said lands as might be required for the year 1875, which would be the first payment, and Jones was to make the second payment, appellant the third payment, and Jones the fourth payment. Each party was to pay one half of the purchase price, and all the expenses that might be incurred in the purchase and care of the sheep, and the sheep and their increase was to be under the care and control of the appellant. Both parties were to put up such quantities of hay each season for

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the sheep as the appellant might think proper, to be done at their equal expense.

The parties, after executing said articles, it appears, engaged in said business. The appellant, on the tenth day of September, 1875, in pursuance of the partnership articles, furnished to the partnership 2,084 sheep and 42 bucks; and several tracts of land were purchased, claimed to be partnership property, the title to which was taken in the name of the appellant.

It further appears that the parties, at Warner Valley, September 16, 1876, signed the following writing:—

“It is this day agreed by and between H. C. Wilson of the first part, and D. R. Jones of the second part, that as soon as the hay-land is purchased of the road company, then the said H. C. Wilson is to deduct the sum of fifteen hundred dollars from the amount D. R. Jones is indebted to him, for the improvements on the ranch.”

And that, at the same time and place, the said Jones executed to appellant, said H. C. Wilson, his promissory note and writing, of which the following is a copy:—

“\$2624.30.

“One day after date, I promise and bind myself or heirs to pay to H. C. Wilson, or order, the just and full sum of \$2624.30, in gold coin, with interest at the rate of one per cent, in like gold coin, for one-half interest in 2,928 head of sheep. The consideration of the above obligation is such that when the said D. R. Jones or his heirs pay to H. C. Wilson the above sum, with interest, then the said Wilson is to deliver to the said D. R. Jones one half of the above band of sheep and their increase.”

On the back of this writing are the following indorsements:—

“Indorsed October 4, 1879. Paid on the within note fourteen hundred and eighty-nine dollars and sixty-one cents (\$1489.61), October 21, 1880. Received on the within, \$1,279.”

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It further appears that said parties continued in their said business until the twenty-sixth day of April, 1881, at which time A. and C. U. Snider caused an attachment to issue out of the circuit court for said county of Lake, in an action in their favor and against the said D. R. Jones, then pending in said court, to be levied upon the interest of said Jones in said sheep.

The sheriff's return upon the writ of attachment is as follows:—

“STATE OF OREGON, }
COUNTY OF LAKE. {

“I heroby certify that I received the annexed writ of attachment on the twenty-fifth day of April, 1881, and executed the same by attaching all the right, title, and interest that the defendant, D. R. Jones, had in and to the copartnership property of Henry C. Wilson and D. R. Jones, doing business under the firm name of Wilson & Jones.

“I also took into my possession the following described personal property of said copartnership, to wit: two thousand head of sheep, more or less, one black mare mule, one bay horse mule. I also served a copy of this writ upon the defendant, D. R. Jones.

“Upon said copy there was indorsed by me a notice that I had attached all his right, title, and interest in and to said copartnership property.

“I also deposited in the post-office at Lakeview, postage prepaid, a copy of said writ of attachment, directed to Henry C. Wilson, at Red Bluff, California, his post-office address; said copy of writ containing a notice that I had attached all the interest of defendant, D. R. Jones, in said copartnership property.

“Dated Lakeview, April 28, 1881.

(Signed)

“J. L. HANKS,

“Sheriff of Lake County, Oregon.”

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Subsequently, and on the seventh day of June, 1881, judgment was entered in said action in favor of the Sniders, and against said Jones, for the aggregate sum of \$1,408.35, recovery, and \$20.80, costs and disbursements. The said judgment entry contained the following clause: "And it is further ordered and adjudged that the said plaintiffs do have execution against the property of the said defendant, and that the property heretofore attached in this action be sold as by law provided, to satisfy the said plaintiff's demands herein."

It further appears that execution was issued upon the said judgment, and that the right, title, and interest of the said Jones in the said sheep were, on the seventeenth day of June, 1881, sold by virtue thereof, and bid in by the respondent; that the said sale purported to be all the right, title, and interest of the said Jones in the sheep-raising business in Lake and Grant counties, Oregon, which he had on or after the seventh day of May, 1881, and which he had in and to the copartnership property of said Wilson & Jones; that respondent's purchase of Jones's interest was on the seventeenth day of June, 1881; that the clip of wool from the sheep for that year was sold, and the proceeds of the sale applied to the payment of copartnership debts due to third persons, except a residue left after such payment, which was divided between the appellant and respondent; that on the fifteenth day of July, 1881, after the sale of the wool, and application of the proceeds as mentioned, the appellant, claiming to be the owner of the entire band of sheep, drove them away, and sold and appropriated them to his own use; that there were of the sheep at the time of the levy of the attachment and sale under the execution, as appears by the stipulation of the parties, 2,559 head of old sheep, and 1,632 head of lambs.

The respondent commenced this suit on the fifth day

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of July, 1881, to have the partnership between the appellant and Jones dissolved; to have a receiver appointed to take charge of all the partnership property; to have an account taken of all the copartnership transactions, and to require the appellant to account therefor, and for all personal property belonging thereto that had come into his hands; to restrain the appellant from interfering with, disposing of any of the debts or effects of the partnership; to have the property of the partnership sold, and the proceeds, after the payment of partnership debts, divided between appellant and respondent; to have the real estate above referred to declared to be partnership property, and the appellant required to execute deeds to purchasers upon the sale thereof, and to have the affairs of the copartnership fully administered upon.

The case was first heard upon the proofs and allegations at the May term, 1883, of the said circuit court, and the respondent's complaint was dismissed, upon the grounds that no copartnership was shown to have existed between appellant and said Jones. An appeal was taken from that decision to this court, and was here reversed, this court being of the opinion that the proofs established the existence of such a copartnership. The case was thereupon remanded to the said circuit court for an accounting. A report of the case will be found in 11 Oregon, 371. The respondent evidently acquired by his purchase Jones's interest in the sheep, which entitled him to the right to have an accounting, in order to ascertain the extent of that interest, and have it declared, but it did not entitle him to have the partnership between the appellant and Jones dissolved, nor to any of the relief claimed in his complaint. He acquired no interest in the land claimed to belong to the partnership by his purchase at the execution sale. The land was not attached, levied upon by the execution, or sold, and he

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could not have the affairs of the partnership administered in any event without Jones being a party to the suit. Counsel for the respondents claim that this court in the case referred to in 11 Oregon settled the question; that on the seventeenth day of June, 1881, the respondent succeeded to all the interest and title of said Jones in the copartnership property of Jones & Wilson by the purchase referred to. This is certainly a mistake.

This court did not undertake to determine the extent of the interest acquired by that purchase. We held that a partnership existed between Wilson and Jones, and that the respondent had acquired such an interest in the partnership property as would entitle him to have an accounting. There was no other question involved in the case, and one of those was only incidental.

The main question was, whether such partnership existed or not. The circuit court held that it did not. This court was of a contrary opinion, but would not have been justified in sending the case back unless satisfied that the appellant therein (this respondent) had such an interest in the partnership property as entitled him to demand an accounting. The extent of that interest was never considered, nor was it necessary, in determining the matter before the court, to consider it.

It was sufficient for the purposes of that decision that the then appellant had such an interest in the partnership property as would give him a standing in court; and his having bid off the two thousand six hundred sheep, more or less, the black mare mule, and the bay horse mule, at the execution sale, or Jones's interest in them, entitled him to such standing. The levy under the attachment was attempted to be made upon tangible property; and it only bound such interest as Jones would have therein, after the partnership debts were all paid, and all claims settled between Wilson and Jones in relation to the part-

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nership property. Any property of the partnership not so levied upon was unaffected by the proceedings.

The only question, therefore, before us at this time is, the amount of the interest in the sheep and other animals respondent herein acquired by bidding them off at the sale referred to. By the terms of the promissory note or writing of September 16, 1876, the one half of the band of 2,126 head of sheep and their increase was not to be delivered to Jones until he or his heirs paid to Wilson the \$2,624.30, and interest thereon. The amount due upon that obligation from Jones to Wilson, at the time of the levy of the attachment, including interest, after deducting the said two payments, was, as I compute it, \$1,126. That sum was a charge upon Jones's half-interest, in the sheep, his absolute right to which depended upon its payment, and the respondent acquired no greater right thereto.

The appellant having appropriated all of the sheep to his own use, and disposed of the band so that a partition thereof cannot be had, he should be required to pay to the respondent, as Jones's successor in interest in the sheep, one half of the value thereof, less said sum of \$1,126. The amount of that value must be ascertained from the evidence and circumstances of the case. The circuit court found that the sheep were worth three dollars a head, and the lambs two dollars a head; but I think that was too high an estimate. The price of the sheep, as fixed by the said writing of September 16, 1876, amounted to less than two dollars and a half a head, and a band of sheep of that number, after having been kept so long as that had been, would certainly deteriorate in price. I think two dollars a head for the sheep, and a dollar and a quarter a head for the lambs, including the entire band, would be a large estimate. The lambs must have been very young at the time referred to, and I think the estimate of their value a very liberal one. At the

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rate mentioned, the sheep would have been worth \$5,118, and the lambs \$2,040, amounting in all to \$7,158. That evidently would have been a large price for the band, and I doubt very much whether that sum could have been realized for it. The respondent bid in Jones's interest at the sale for a sum much less than it would have amounted to upon that basis, and that ought to be some criterion of the value of the property. One half of the \$7,158, less the \$1,126, amounts to \$2,453, and the interest thereon, at the rate of eight per cent per annum, to the time of the entry of the decree in this court, will increase it to \$3,875, which is the amount, in my opinion, the respondent is entitled to recover.

This view contemplates the cancellation by Wilson of the promissory note or writing for \$2,624.30, executed by Jones to him on the sixteenth day of September, 1876, and it is not intended to determine any question as to the rights of the partners, Wilson and Jones, in the lands referred to in the complaint which are claimed to be partnership property,—nor rights in any other property.

Respondent should also be entitled to recover his costs and disbursements herein, and the decree appealed from should be so modified as to conform to this opinion.

LORD, C. J., dissenting.—I concur in all the matters expressed in the opinion except as to the value of the sheep. These the majority of the court find to be of the value of two dollars a head for the old sheep, and one dollar and a quarter for the lambs. The court below found that the old sheep were worth three dollars, and the lambs two dollars, per head.

The evidence discloses, as found by the referee, that the defendant forcibly took possession of the band of sheep and lambs, and drove them to Tehama County, California; that he there continued to carry on the business of sheep-

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raising for two years with these sheep and lambs. And the referee thinks and finds that the defendant realized a profit of thirty per cent per annum upon them, and that afterwards he drove a portion or all of them to Montana and sold them for prices ranging from three dollars and fifty cents to two dollars and twenty cents per head.

In thus driving this band of sheep and lambs without the jurisdiction, and converting them to his own use, the defendant stands in the attitude of a wrong-doer, and comes into court with no equities which entitle him to special consideration. On the contrary, equity imposes upon him the imperative duty to give a true account of his unwarrantable stewardship, and confirm its transaction with accurate accounts and vouchers. This he has not done, and failing to furnish an account of profits and vouchers of sales, a court of equity will not screen his delinquency by indulging any favorable presumptions in his behalf.

By his wrongful act the plaintiff was deprived of all opportunity of supervision and control over the band of sheep, and the defendant became thereby his trustee, and bound to a strict liability to account for all profits and sales. What profits during this interim he realized, or sales he made, the price, and to whom sold, it is not possible for the plaintiff to know, nor has the defendant kept or furnished any account, or produced any vouchers of such transactions. These are all matters wholly within the knowledge of the defendant; they are his acts or dealings with this property appropriated by him, and from which the law will not permit him to derive a benefit, to the injury or detriment of the plaintiff.

It cannot be disputed but what there is ample evidence in the record to support the finding of the court as to the value of these sheep and lambs; but even if the evidence was evenly balanced, every consideration of equity and

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justice requires that the plaintiff should have the benefit of all presumptions and intendments as against this defendant. Nor is this all. His own testimony is to the effect that he mixed these sheep and lambs with other sheep of his own, and sold the band so mixed at three dollars and fifty cents, two dollars and seventy-five cents, and two dollars and twenty-five cents per head,—a majority of them at two dollars and fifty cents. Which of such sheep he received three dollars and fifty cents or two dollars and twenty-five cents, whether his own or those he had converted, he has kept no account, nor knows, and the court is left to wade through a sea of doubt and perplexity which his misconduct has occasioned, and compelled to resort to less reliable sources of evidence to ascertain the truth.

In such a case, it seems to me, in view of his testimony to cut down the finding of the court below to the extent done in the opinion, and below the legitimate inferences of his own evidence, is to invert the principles of equity, and give him the benefit of his own delinquency. The better principles would be, in view of his failure to keep accounts, to assume that he received the highest price for this band of sheep, or certainly, if a mean value is to be ascertained, that found by the court below furnishes a better and safer standard, as it is supported by the weight of evidence, and, I think, more consistent with the principles of right and justice upon the facts of this case.

On rehearing had in the above case the decree was changed and the opinion modified so as to allow the respondent three dollars per head for the old sheep and one dollar and fifty cents per head for the lambs, aggregating one half of \$10,125. And also the court ascertained that the appellant should be allowed for one note due to him from Jones, and not considered in the first opinion, amounting, with interest, to \$553.11, which, added to the \$1,126, makes a total of \$1,679.11 to be deducted from the half of \$10,125, which leaves \$3,383.39, the amount of the principal of the decree in favor of the respondent. The court allowed interest on this sum at eight per cent since June 17, 1881, which makes the total of the amount of the decree at the date thereof, to wit, April 11, 1886, computing \$5,502.66. — *REPORTER.*

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[Filed July 2, 1888.]

M. R. SAVAGE, RESPONDENT, v. CLARK C. McCORKLE ET AL., APPELLANTS.

EQUITY — CORRECTION OF MISTAKE IN DEED AGAINST HEIR OF GRANTOR. —

The grantor in a deed may have a mistake in such a deed corrected against the heir at law of the grantee therein.

DEED — MISTAKE — MAINTENANCE. — Where it was agreed that a part of the consideration for a deed was the support of the grantors by the grantees while they lived, and that the same should be inserted in the deed, but by mutual mistake was omitted, the grantors in such a deed may have the same corrected by a suit for that purpose against the grantee or his successor, who paid no value or took with notice.

MINOR DEFENDANT — COMPROMISE — DECREE. — In such suit a minor defendant may, with the consent of the court, enter into a stipulation by his guardian by way of compromise, and a decree entered on such stipulation will be binding on such minor to the same extent and have the same effect as if he were of full age. *Semble*, that a decree, entered without such consent, remaining unimpeached and unreversed, has the same effect, and such infant will not be permitted to dispute it, except upon the grounds that would be available to him if he were an adult.

DECREE — PARTIES — PRIVIES. — A decree is valid and binding between the parties to it and those in privity with them; but it in no manner affects strangers. They can neither be benefited nor prejudiced by it.

CASE IN JUDGMENT. — Where a decree settled and fixed the liability of the defendant therein to support and maintain the plaintiffs while they lived, one who was not a party to such decree cannot furnish maintenance to the plaintiffs without the defendant's request, and compel the defendant to pay the same directly to him. Such person is a stranger to the decree, and not in privity with any of the parties to it.

APPEAL from Marion County.

Shaw & Gregg, for Appellant.

N. B. Knight, for Respondent.

STRAHAN, J. — This proceeding was commenced in the county court of Marion County, by filing a petition properly verified, and the service of a citation directed to the minor as well as his guardian. An amended petition was filed, in which it was alleged substantially as follows:

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That the defendant, Clark C. McCorkle, is a minor and the owner in fee, subject to the lien hereinafter mentioned, of the real property described in the petition; that by a decree of the circuit court of the state of Oregon for Marion County, rendered on the thirteenth day of February, 1884, in a suit in which Jane Murphy was plaintiff and said Clark C. McCorkle was defendant, a copy of said decree is hereto attached, marked "Exhibit A," and made a part of this petition. The above-described land was made chargeable for the maintenance and support of the said Jane E. Murphy and her husband, James Murphy, and the expenses for the same were by said decree made a lien upon said land; that your petitioner holds a lien upon said lands for the expenses incurred in the maintenance and support of the said James and Jane Murphy of,—1. For the sum of \$233.33, with interest thereon from the twenty-ninth day of March, 1884; 2. For the sum of \$100, with interest thereon from the twenty-seventh day of November, 1885; 3. For the sum of \$126, with interest thereon from the twentieth day of February, 1886. Copies of said claims are hereto attached and marked respectively exhibits "B," "C," and "D," and made a part of this amended petition; that each and all of said claims are now and for a long time have been due and payable, but that no part of the same has been paid; that J. E. Murphy is the duly appointed, qualified, and acting guardian of said minor, Clark C. McCorkle; that said guardian neglects, fails, and refuses to pay said claims or any part thereof, although often requested so to do. Therefore your petitioner prays the court that a citation issue to said minor and his said guardian to show cause, if any they have, why said claims should not be thus paid out of the estate of said minor, and if no good cause be shown why said claims should not be thus paid, then in that event the said J. E. Murphy be ordered and directed by

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this court to pay said claims out of the personal property of said minor, if sufficient, and if not, then to be ordered and directed to proceed, according to law, to pay said claims out of the real estate of said minor, and that he be ordered to pay the costs and disbursements of this proceeding, and for such other and further relief as to the court may seem just and proper.

Exhibits annexed to the petition are the complaint, answer, stipulation, and final decree of the circuit court of Marion County, Oregon, rendered and given in a suit in said court, wherein Jane Murphy was plaintiff and said Clark C. McCorkle was the defendant.

It was alleged in the complaint in that suit that Jane Murphy is the widow of James Murphy, deceased; that Lydia McCorkle, theretofore deceased, was the daughter of James and Jane Murphy; that Clark C. McCorkle was the only heir at law of said Lydia and one Alexander McCorkle, also deceased; that on the sixth day of April, 1868, the said James and Jane Murphy made a deed to Alexander McCorkle, conveying to him certain lands, which are the same lands described in the petition in this proceeding, which lands when conveyed were reasonably worth seven thousand dollars; that said deed did not express the true or full consideration for the conveyance of said lands; that a further consideration for said deed was the agreement that said Alexander McCorkle, his heirs and assigns, should maintain and support the said James and Jane Murphy during their and each of their natural lives, and the words expressing said agreement were omitted from said deed by mistake.

The alleged agreement and mistake were denied by the answer, but by a stipulation entered into and signed by the attorneys of the parties, and by the defendant's guardian, J. E. Murphy, that "by way of and as and for a compromise herein, that the deed mentioned in the de-

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defendant's complaint herein shall stand as it is, and without reformation, and that the defendant shall furnish the said plaintiff a reasonable support during her natural life, or pay to or for her the reasonable expenses thereof, and that such support, or the reasonable expense or the cost thereof, shall be or remain a charge or lien upon the lands and premises described in the complaint and deed until paid or furnished, and that the same shall be paid as often as once in three months during the plaintiff's natural life, after the same shall have been allowed by the county judge of Marion County; and further, that the defendant shall pay such reasonable charges and expenses as may have been accrued or been incurred since the death of said Lydia A. McCorkle for the support of said James and Jane Murphy, or either or both of them, to the present time, and that the said land shall be charged with said charges and expenses, and the same shall be and remain a lien upon said land until paid, and that before said or any charges or expenses shall be paid, the same shall be presented to and allowed and determined by the county judge of Marion County." A final decree was entered in said cause in all particulars following the stipulation.

Exhibit B referred to is as follows:—

"SALEM, OREGON, March 29, 1884.

"C. C. McCorkle, Minor, Dr.,

"To M. R. Savage:—

"To maintenance and support of James and Jane Murphy from the fifth day of May to the ninth day of October, 1883, at \$40 per month

\$205 33

"To medicines furnished

9 00

"To funeral expenses of James Murphy

24 00

"Total..... \$238 33

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"STATE OF OREGON,)
COUNTY OF MARION. } ss.

"I, M. R. Savage, being first duly sworn, say that the foregoing bill is correct, as I verily believe.

"M. R. SAVAGE.

"Sworn to and subscribed before me this twenty-ninth day of March, 1884. E. A. DOWNING, Notary Public."

"Allowed this twenty-ninth day of March, 1884.

"T. C. SHAW, County Judge."

Exhibit C is a like claim for the support of Jane Murphy from the twenty-fifth day of August to the twenty-fifth day of November, 1885, at the rate of \$33½ per month, \$100; and exhibit D is a like claim for the support of Jane Murphy from November 25, 1885, to February 7, 1886, at \$33½ per month, and her funeral expenses, \$126.60.

Each of these claims are verified and indorsed in like manner as exhibit B by the county judge of Marion County. The defendants demurred to said petition and assigned these grounds of demurrer:—

1. Said petition does not state facts sufficient to show that said plaintiff has any cause of action or suit against the defendants, or either of them.

2. Said petition does not state facts sufficient to constitute a cause of action, or suit, or proceeding against said defendants, or either of them, or against the premises described in the petition.

3. Said petition does not state facts sufficient upon which to base the issuing of the citation herein.

4. Said petition does not state facts sufficient to show that the plaintiff has any claim whatever against the defendants, or either of them, or against the premises mentioned therein, on which to base the citation herein, or on which to give this court jurisdiction over the persons

or subject-matter therein mentioned. The county court sustained the demurrer and dismissed the proceedings.

Upon appeal to the circuit court, the action of the county court was reversed, and a decree given in favor of the plaintiff for his costs, and the cause remanded to the county court for further proceedings, from which decree this appeal is taken. All of the points made by the demurrer present but two objections: one is, whether or not facts stated in the petition are sufficient to entitle the plaintiff to any relief whatever; the other is, whether or not the county court has jurisdiction to grant such relief.

1. If the defendant is liable in any form, or under any circumstances, for the support of James and Jane Murphy, such liability arises out of the decree above mentioned. The cause of suit upon which that suit was founded was the mistake made in the deed which James and Jane Murphy executed to Alexander McCorkle, the defendant's ancestor. When Alexander McCorkle died, the land which he acquired by the deed in which the alleged mistake existed descended to the defendant Clark C. McCorkle subject to the right in the grantors in said deed to have said alleged mistake corrected. This is the right which Jane Murphy, one of the grantors in the deed, asserted in the suit, and sought to have such deed corrected by the decree, so as to insert therein a provision which would render Alexander McCorkle, his heirs and assigns, liable for the support of the grantors during the lives of each. If the grantee received the deed under a contract which subjected the land to that charge, and the clause declaring his obligation was omitted by mistake, it was entirely proper for the surviving grantor to ask to have it corrected.

During the progress of the suit, and after it was at issue, the defendant, through his attorneys and by his guardian, compromised said suit by entering into an agreement

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and stipulation upon which a decree was finally entered. He now in effect says that he is not, nor is his property, bound by that decree, because he says it is void; and that is the first question to which our attention will be directed.

The general rule under the former chancery practice was, that an infant was as much bound by a decree against him as an adult. A standard author, writing upon the chancery practice, says: "An infant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error." (1 Daniell's Chancery Practice, 164.) Freeman on Judgments, section 151, announces the same principle. He says: "If an absolute decree be made against an infant, he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult." And this court has fully adopted and sanctioned the same view. (*English v. Savage*, 5 Or. 518.)

2. But it was argued that the decree was founded upon a stipulation made by way of compromise, and that for that reason it is void. In this collateral inquiry, if it were competent to look behind the decree to see upon what it was based,—which we do not concede,—the result claimed by the appellants would not follow. The rule seems to be, that the court will not usually make a decree by consent where infants are concerned without an inquiry whether it is for their benefit; yet when a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made, that it would be for their benefit. (1 Daniell's Chancery

Practice, 163, 164.) And this practice also has received the sanction of this court. (*English v. Savage, supra.*) Compromises made with the consent of the court in cases where infants are parties, and no fraud is alleged, have always been upheld. (*Brooke v. Lord Mastyn*, 33 Beav. 457; 2 DeGex, J. & S. 373; *Walsh v. Walsh*, 116 Mass. 377; *Lippiat v. Holley*, 1 Beav. 423.)

3. But at this point in the investigation we are confronted with a more serious and difficult question. This decree is binding and conclusive between the parties to it and their privies, but in no manner affects strangers. A stranger to a decree can neither be benefited nor prejudiced by it. These principles are so entirely elementary that they do not need a citation of authorities to sustain them. What facts, then, does the plaintiff show which would enable him to compel the defendant to perform the duty and discharge the obligation which, under the decree, he owed to Mrs. Murphy, the plaintiff?

It was suggested on the argument that the allowance of their claims by the county judge of Marion County gave them a *status* somewhat different from that which they would have occupied without it. This allowance by him was made under the decree already referred to, and the only legal sanction it has is such as was imparted to it by that decree. There is no law conferring any such jurisdiction on the county judge, and whatever effect might have been given to its exercise between the parties to the decree, it is conceived that it could not be extended to the claims or demands of a person who was not a party to it.

If it be conceded that parties to a decree could by stipulation by way of compromise bind themselves to submit to that method of ascertaining and adjusting the amounts to be paid under such decree, it would not follow that a stranger to it not in privity with either party could take advantage of it, and establish a right by virtue thereof.

Points decided.

If, as is probable, the present plaintiff furnished the deceased Mr. and Mrs. Murphy with the maintenance charged for, at their request,—which does not appear from this record,—he has a claim against them which might be worked out through an administrator; and if the defendant refused to support and maintain them, as he was bound to do by the terms of the decree, he remains liable to the administrator of the deceased for the non-fulfillment of that duty. Having reached the conclusion that the petition does not state sufficient facts to entitle the plaintiff to any relief, the consideration of the second question suggested becomes unnecessary.

The decree of the circuit court must be reversed, and the proceeding dismissed without prejudice.

NOTE.—On petition for rehearing, the court adhered to its first opinion, and denied the petition, but modified the judgment so that the respondent might amend his pleadings in the court below. — REPORTER.

[Filed October 25, 1888.]

STRODE, RESPONDENT, v. WASHER ET AL., APPELLANTS.

TAXATION — VALIDITY — CONCLUSIVENESS OF TAX DEED. — In an action to determine the title to certain realty claimed under a tax deed, evidence tending to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum, was excluded: *held*, error, even under a statute making a tax deed evidence of the regularity of an assessment.

CONSTITUTIONAL LAW — IMPAIRING OBLIGATION OF CONTRACTS. — Miscellaneous Laws of Oregon, chapter 57, section 90, which provides that a tax deed shall be conclusive evidence of the regularity of the levy, assessment, collection of taxes, and sale of the property, was amended in 1887 so as to destroy the conclusive effect of the tax deed in these several proceedings: *held*, this amendment does not impair the obligation of contracts as to purchases made prior to the amendment, but simply changes the rule of evidence.

17	50
25	115
16*	928
35*	28
17	50
129	566
17	50
440	22
17	50
41	19
17	50
45	423

APPEAL from Circuit Court, Multnomah County.

Action by V. K. Strode against Henry Washer *et al.*, to recover possession of certain lands claimed under a tax deed. Judgment for plaintiff, and defendants appeal.

George H. Durham and *F. A. E. Starr*, for Appellants.

W. Scott Beebe and *Strode & Beach*, for Respondent.

THAYER, J.—The respondent commenced an action in said circuit court against the appellants to recover the possession of lots 7 and 8, block 130, in Carruthers's Addition to the city of Portland, alleging that he was the owner thereof in fee. The appellants denied his ownership, and claimed the ownership of the lots to be in the appellant, Dora Washer, in fee. The main issue in the case is as to the validity of a certain tax deed under which the respondent claims.

It appears that Thomas A. Jordan, sheriff of said county of Multnomah, on the fourteenth day of December, 1886, executed to one J. E. Bennett a deed to the lots under a sale thereof claimed to have been made by Jordan's predecessor to Bennett for the non-payment of taxes, and that Bennett conveyed them to the respondent. The tax deed contains the usual recitals. The taxes are claimed to have been for the year 1883, and the sale made on the eighteenth day of June, 1884.

The complaint in the action was filed March 17, 1887. The appellants set up in their answer, in addition to the matters referred to, the respondent's pretended source of title to the lots, and that his claim thereto was illegal and void on account of fraud and irregularities in the assessment upon which the sale was based, and in the sale itself, and tendered and brought into court the amount of taxes admitted to be due, the cost of sale, the twenty per cent

Opinion of the Court — Thayer, J.

interest thereon, and the fee for making certificate, in accordance with the act of the legislative assembly of the state, of date, February 21, 1887, amending section 90, chapter 57, Miscellaneous Laws, which provided the effect of a deed upon the sale of real property for the payment of taxes after a failure to redeem the same.

The respondent, after introducing said deeds, rested, and thereupon the appellants offered to show, by the assessment roll of said county for said year of 1883, that said lots were not assessed for taxes for that year to either the owner or occupant thereof, nor described, nor the value thereof set down in the assessment roll, in a part thereof separate from the other assessments, and for the purpose of showing said matters offered the tax roll of said county, of which a copy is appended to the bill of exceptions. The respondent's counsel objected to the evidence, for the reason that it was immaterial and incompetent, and the court sustained the objection, and the appellants' counsel saved an exception to the ruling. Said counsel made several other offers of evidence to the same effect, which were also objected to and excluded by the court, to which exceptions were saved.

The copy of the "tax roll" appended to the bill of exceptions contains the usual headings of an assessment roll. Under the name "Unknown owners, P. Carruthers's Add.," appears, under the heading "Number of lots," the following figures, "5, 6, 7, 8"; and under the heading "Blocks" appears in figures, "130"; and under the heading "Value of all city or town lots" appears in figures, "600."

The appellants' counsel in one of the offers offered to show that two of said lots, 5 and 6, did not belong to said appellant at any time, and that the appellants, nor either of them, claimed any interest in the same.

It appears that the respondent's counsel maintained

the view that the tax deed could not be impeached except by proof, as provided by said section 90, chapter 57, Miscellaneous Laws, and the court sustained that view.

It was claimed by the appellants' counsel that the delinquent tax list was defective, and that the warrant for the collection of taxes was invalid, and the notice of sale wholly insufficient. But the respondent's counsel contends that none of the defects claimed affect the validity of the tax deed; that the statute in force at the time of the sale of lots afforded a presumption in favor of the regularity of the deed which could not be disputed by proof of any of the matters complained of; and that the amendment of said section 90, and consequent repeal of its provisions relating to the conclusive effect of the deed, could not affect the right of the respondent under it without impairing the obligation of contracts.

Statutes of the nature of the one above referred to have been upheld in many instances by courts of the highest standing; still I am not aware of any case in which a court has decided, where a tax sale was void,—where the proceedings were an absolute nullity,—that the deed could not be impeached by showing such defect, although the proof was not of the character specified in the statute authorizing the proceedings to be disputed and avoided.

It would doubtless be a wholesome and safe rule to establish that the legislature has power to declare that a neglect to perform any act relating to the assessment and collection of taxes that it had the right to dispense with in the outset should not defeat a sale of the property for non-payment thereof; but to attempt to dispense with the assessment of the property or levy of the tax, and allow an enforcement of a pretended tax, would be sanctioning an arbitrary exaction. It would not be a tax levied in pursuance of law as provided, in effect, by the constitution of the state.

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I think, therefore, that at least the invalidity of the assessment and levy are always open to inquiry in an action relating to the title to the property claimed under a tax deed, and that a statutory enactment precluding such inquiry would be a nullity.

The assessment is the foundation of the right to make the levy. The county court has no jurisdiction to make a levy unless there has been an assessment. The equality and uniformity of taxation required by the constitution could not otherwise be maintained.

The view here expressed seems to be sanctioned in *Sharpleigh v. Surdam*, 1 Flip. 472, as coming within the spirit of the statute itself. The learned judge, at pages 486, 487, says:—

The statute demands some proceedings before it can have any possible application. They must be colorable, embodying a fair and honest attempt to afford the delinquent citizen the opportunity the statute contemplates to perform his public duty. There must always be a colorable proceeding in which irregularities may occur. Without this, the exigency in which the law is to have force does not occur. Thus treated (as every court intelligent upon this subject would treat it), it is but what, in modern times, is wholly a commonplace enactment. It says "if the land is subject to taxation, if a tax was in fact assessed, so as to give a citizen an opportunity to pay it, and he neglects it, and a colorable attempt, free from all fraud and unfairness, has been made by public officers to sell his land to collect what he has been delinquent in paying, that mere irregularities shall not defeat the title."

Legality of the Assessment.—In the case under consideration, there seems to have been an attempt to assess the property, but it was wholly futile. It did not give the owner an opportunity to pay the tax; did not furnish any basis

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by which the amount assessed upon the property could be ascertained. Grouping the lots with other lots not belonging to the appellant, and fixing the valuation of the whole in a gross sum, was not an assessment.

If the lots had all belonged to the said appellant, the assessor would have had no right to value them in that way. The law requires that the assessor shall set down in the assessment roll, in separate columns, "a description of each tract or parcel of land to be taxed, specifying under separate heads, the township," etc., "or if divided into lots and blocks, then the number of the lot and block," and shall set down, etc., "the full cash value of each parcel of land taxed." (Miscellaneous Laws, sec. 29, subd. 4, c. 57.) The owner has a right to know what each of his lots, when his land in a city, village, or town has been platted into lots, has been valued at; but it is much less important in such case than where his lots are included with those belonging to another. In the latter case, he has no means whatever to determine the amount of tax he is required to pay; that such an attempted assessment, under the circumstances of this case, is a nullity, there cannot, it seems to me, be any doubt. The authorities in *Terrill v. Groves*, 18 Cal. 149, *Howe v. People*, 86 Ill. 290, *Hamilton v. City of Fond du Lac*, 25 Wis. 494, *Wiley v. Scoville's Lessees*, 9 Ohio, 43, and in *Cooley on Taxation*, 400, cited by the appellant's counsel, fully sustain that view, and it is supported upon reason and principle. If this conclusion as to the validity of the assessment is correct, there is no need of considering the questions arising out of the proceedings to enforce the payment of the tax. They fall by their own weight. There is nothing to support them, and the determination of the question of their irregularity or invalidity arising out of their alleged inherent defects is not necessary to the decision of the case.

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Construction of Act of 1887, Amending Section 90, Chapter 57, Miscellaneous Laws.—The question as to the effect of the amendment of said section 90, chapter 57, Miscellaneous Laws, is, however, important, in order to determine whether or not the respondent is entitled to the benefit of the said tender. The power of the legislature to repeal a statute, and thereby cut off all inchoate rights derived from it, except so far as restricted by the federal and state constitutions, is undoubted. The repeal obliterates the statute as completely as though it had never been passed. A right which has been so perfected as to enable it to stand independent of the statute remains unaffected by the repeal. But rights which are executory merely are lost, unless preserved by a saving clause. (*Butler v. Palmer*, 1 Hill, 324.) The amendment of said section 90, and consequent repeal of certain of its provisions, as before mentioned, destroyed the conclusive effect of a tax deed as evidence of the regularity of the levy, assessment, collection of the taxes, and the sale of the property in any case. It no longer confines the right to dispute or avoid the presumption of the regularity of those proceedings to the cases specified in said section,—viz., fraud in the assessment or collection of tax; payment of the tax before sale, or redemption after the sale, and the payment or redemption was prevented by the fraud of the purchaser; that the property at the time of the sale was not liable; and that no part of the tax was levied or assessed upon the property sold,—but allows it to be disputed and avoided in any case in which the law would adjudge an irregularity sufficient to render the proceedings a nullity.

The proceedings referred to are presumed to be regular in both cases, but, in the former case, the presumption cannot be overcome except by proving the specific matters above set out, while in the latter it may be overcome by proving any matters sufficient for that purpose. To the

Opinion of the Court—Thayer, J

extent here indicated, the former statute is repealed by the later one; and if the amendment is construed as applicable to cases where the sale has been made and the deed executed prior to its adoption, and that would have the effect to impair the obligation of a contract, it would, so far, be void.

It must be conceded that, if there were no statute creating a presumption in such cases, the holder of a tax deed could establish no title to the premises by virtue thereof, without proof that every requirement of the statute, concerning the assessment of the tax and enforcement of its payment, had been complied with. He is entitled to the benefit of the presumption, because the legislature, on account of public policy, has said he should be. No one would contend that the common law would recognize the acquisition of title to property, under statutory proceedings, until it was proved that they were duly had. The owner could not be divested of title, in such a case, without a strict compliance with the terms of the statute; and proof of such compliance would have been essential to establish that a change of ownership had been effected. The question is, whether, after a statute has been enacted shifting the *onus* of such proof, it can be repealed or changed so as to affect the rights of a purchaser at a tax sale, where the tax was levied, the sale made, and the deed executed during the life of the statute, without destroying vested rights in property.

This identical question in principle was determined in *Smith v. Cleveland*, 17 Wis. 573. There a similar statute was repealed by the legislature, saving acts done or rights accrued or established, and providing that every such act or right should remain as valid and effectual as if the provision so repealed had remained in full force. Subsequently the legislature passed another act, in which it was declared that any deed executed prior to its passage, upon

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the sale of any land for the non-payment of taxes, should be *prima facie* evidence only of the regularity of all proceedings requisite to the legal and effectual execution thereof, from the valuation of the land by the assessor to the execution of such deed. The court there held that the latter statute was invalid as impairing the obligation of a contract.

But in *Hickox v. Tallman*, 38 Barb. 608, a similar case, it was held that a grantee in such a deed had no vested right to the benefit of the presumptions in respect to the regularity of the sale, and all the proceedings prior thereto, authorized by the statute to be drawn in his favor; that it was competent for the legislature to change the burden of proof, in a given case, from one party, and cast it upon another, no rule of evidence at common law being changed; and this holding is approved in *Howard v. Moot*, 64 N. Y. 262.

I am inclined to be skeptical upon the point that the repeal or change of said provision of statute operated to impair the obligations of the contract of purchase at the tax sale. I do not clearly comprehend that the obligations in favor of a purchaser can be, arising out of a sale *in invitum*, beyond the right to obtain the interest of the owner in the thing purchased when the requisite steps authorizing the sale have been taken.

I am aware that certain officers of the law are invested with power, in certain cases, to sell and transfer the interest of a party in property against the will of such party, and that a rightful exercise of the power will operate to divest the title to the property out of the party, and vest it in the purchaser. But the person to be despoiled of his property in such a case does not undertake that the power will be properly exercised, nor does the officer who executes the deed. The purchaser must take the risk of that himself. The former is resistant. He says: "You

have the right to deprive me of my property against my will, provided you pursue the power conferred upon you strictly; otherwise, you are a wrong-doer." That is the attitude he occupies, and I am unable to discover any obligation the purchaser in such case can claim the benefit of further than I have suggested,—the right to the property in case the power has been duly executed.

The legislature of the state at one time deemed it wise and judicious to declare that upon the delivery of a tax deed the proceedings required or directed by law in relation to the levy, etc., should be presumed regular, and to have been had and done in accordance with law, and that such deed should be *prima facie* evidence of title in the grantee, "and that such presumption and such *prima facie* evidence should not be disputed or avoided except by proof" of the four several matters before enumerated. Such became the law, and it was doubtless an advantage to purchasers of tax titles. It did not undertake to dispense with any of the requirements of the law necessary to the validity of the sale of the property for the non-payment of the tax; but by changing the *onus* to the party whose property was sought to be sequestered, and requiring him to establish the irregularity of the proceedings, if he desired to avoid their effect, and limit the inquiry to certain matters, it often enabled the purchaser to hold the property, whether he was lawfully entitled to it or not. This is the vested right of property in the purchaser, it seems to me, which is contended for.

What obligation there is in favor of the purchaser to maintain such a rule of evidence is more than I can conceive. He is deprived of no legitimate right in consequence of the change. If the power has been duly exercised, his title to the property is assured; if, on the other hand, the conditions upon which it was authorized to be exercised have not been performed, he has no right to it.

Petition for Rehearing.

The change in the law has removed a barrier the legislature interposed against a full inquiry into the matter, and I do not think it has the effect to impair the obligation of any contract, although it has modified the former rule of evidence upon the subject. It follows from this view that the judgment appealed from must be reversed, and the case remanded for a new trial.

LORD, C. J., expresses no opinion upon the second question considered herein.

PETITION FOR REHEARING.

[Filed, March 6, 1888.]

PER CURIAM.—We have considered with some care the petition for rehearing herein, and are constrained to adhere to the opinion we have before expressed. We are satisfied that the offer made at the trial to show that the lots in question were included with two other lots in the attempted assessment should have been allowed, and that if such proof were made, the assessment should be deemed a nullity. Several lots of land belonging to different owners cannot legally be assessed to one of them, and the value of all fixed at a gross sum. What the effect would be where the lots so assessed all belong to the same party, we express no opinion.

Upon the question of the construction of the act of 1887, amending section 90, chapter 57, Miscellaneous Laws, our former views remain the same, although we are conscious that the question approaches very near the dividing line between the remedy and the obligation of contracts. We have been unable, however, to discover any authority convincing us that the amendment operates further than to change a rule of evidence which the legislature has at all times full power to effect without impairing the obligation of contracts. (Cooley on Constitutional Limitations, sec. 451.)

The petition will therefore be denied.

[Filed November 1, 1888.]

GEORGE MILLER, APPELLANT, v. HENRY LYNCH,
RESPONDENT.17 61
88 145

STATUTE OF FRAUDS — AGREEMENT TO ANSWER FOR ANOTHER'S DEBT, WHEN NEW AND ORIGINAL, AND WHEN COLLATERAL. — S. was indebted to M. in the sum of one hundred and sixty dollars, to be paid in rails at fifty dollars per thousand, to secure the performance of which agreement S. had pledged certain property to M. If the defendant agreed with the plaintiff to pay him the one hundred and sixty dollars which S. owed him, and that in consideration of such agreement the plaintiff discharged S. from all liability for said debt, and released the property which he held in pledge for its payment, the defendant's agreement to pay the one hundred and sixty dollars to M. is a new and original agreement, and is not within the statute of frauds. *Aliter*, it is within the statute, and void.

STATUTE OF FRAUDS — VERBAL PROMISE. — A verbal promise to pay the debt of another if the creditor will forbear to sue or discontinue a suit already begun, or release a lien on personal property held in pledge, unless the promisor derives a benefit therefrom peculiar to himself, are all collateral undertakings, and within the statute, unless in writing.

APPEAL from Union County.

R. Eakin & Brother, for Appellant.

G. G. Bingham, for Respondent.

STRAHAN, J. — The amended complaint states, in substance: That on the twentieth day of March, 1887, one John Smith was indebted to the plaintiff in the sum of one hundred and sixty dollars, to be by him paid in rails, viz., three thousand rails at fifty dollars per thousand, to be made and delivered on or before July 1, 1887, and that, as security for the payment thereof by said John Smith to plaintiff, plaintiff had a pledge therefor, — two horses, two sets of harness, and wagon and bob-sled; that said defendant, on said twentieth day of March, 1887, being desirous to obtain the services of said Smith, and in order to obtain his services, requested the plaintiff to release him from his said contract to make and deliver the said rails,

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viz., three thousand rails, and to release the said property so pledged for the payment thereof, and in consideration that the plaintiff would release the said John Smith and the said pledged property, the defendant undertook and agreed to pay to plaintiff said sum of one hundred and sixty dollars in money on or before June, 1887; that thereupon, and in consideration of said promise of the defendant, and with the approval of said John Smith then and there given, the plaintiff did so release the said John Smith from his said contract to make and deliver said rails, and also did so release the property so pledged for the payment thereof, and accepted the defendant and his undertaking to pay the said amount in money, etc.

The answer denied each material allegation in the complaint. Upon the trial the plaintiff was nonsuited by the court after all the evidence offered by him was excluded, to all of which proper exceptions were taken.

The plaintiff, George Miller, being on the stand as a witness in his own behalf, his attorney sought and offered to prove by him "that defendant came to plaintiff's house and desired John Smith to work for him, and agreed with plaintiff that if plaintiff would release him from his contract to plaintiff to get out and deliver rails, and would release the property held in pledge therefor, the defendant would pay the plaintiff the value of the rails, viz., three thousand rails at fifty dollars per thousand, and that plaintiff, in consideration of said promise, released said John Smith from his contract, and did release the property so held in pledge; and that John Smith was present and assented to that arrangement. And the defendant requested plaintiff to release said John Smith from liability to the plaintiff on the contract testified to, and to release said pledged property." All of which testimony was objected to by defendant's counsel as incompetent, unless shown to be in writing, and the objection was sustained.

These offers of evidence and the ruling of the court excluding them present the only material questions necessary to be considered on this appeal. By these rulings the court below, in effect, held that the promise of the defendant was within the statute, and therefore void, because not in writing.

1. Upon the argument here it was contended on the part of the appellant that this was a new and original undertaking on the part of the defendant, made upon a new consideration, and in no sense "an agreement to answer for the debt, default, or miscarriage of another." That depends entirely on the question of fact whether or not Smith's debt to the plaintiff was discharged.

If his liability to the plaintiff was extinguished by the new agreement, so that the plaintiff had no further claim against him either for the rails or the debt, then the defendant's agreement was a new and original undertaking, in no sense collateral, and is not within the statute of frauds. (*Day v. Cloe*, 4 Bush, 563; *Yale v. Edgerton*, 14 Minn. 194; *Booth v. Eighmie*, 60 N. Y. 238; *Underwood v. Lovelace*, 61 Ala. 155; *Stone v. Symmes*, 18 Pick. 467; *Watson v. Jacobs*, 29 Vt. 169; *Gleason v. Briggs*, 28 Vt. 135; *Lord v. Davidson*, 3 Allen, 131; *Eddy v. Roberts*, 17 Ill. 505; *Warren v. Smith*, 24 Tex. 484; *Harris v. Young*, 40 Ga. 65; *Furbish v. Goodnough*, 98 Mass. 296.)

On the other hand, if Smith's debt to the plaintiff was not discharged or extinguished by the agreement, and what the parties did at the time the new agreement was made, then the defendant's agreement, being collateral, is within the statute of frauds, and is void, unless in writing. The fact that Smith was released from his obligation to make the rails, and that the plaintiff released Smith's property which he had in pledge to secure the performance of Smith's agreement, would make no difference.

A verbal promise to pay the debt of another if the

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creditor will forbear to sue, or discontinue a suit already begun, or release an attachment, or if he will forbear making an attachment, unless the promisor derives a benefit or advantage therefrom peculiar to himself, are clearly collateral undertakings, and within the statute, and are void, unless in writing. (*Forth v. Stanton*, 20 Wend. 201; *Thomas v. Delphy*, 33 Md. 373; *Hilton v. Dinsmore*, 21 Me. 410; *Duffy v. Munch*, 42 N. Y. 243; *Licher v. Levy*, 3 Met. (Ky.) 292.)

If Smith's obligation to pay the plaintiff the amount specified remained in force,—and it did unless the plaintiff released him from liability to pay,—the defendant's promise, being collateral, could not be enforced unless the same was evidenced by writing. (*Furbish v. Goodnough*, *supra*; *Gill v. Herrick*, 111 Mass. 501; *Curtis v. Brown*, 5 Cush. 488; 1 Wms. Saund. 233; *Brittian v. Thrailkill*, 5 Jones, 329; *Stones v. Symmes*, 18 Pick. 467; *Brown v. Hazen*, 11 Mich. 219; *Shoemaker v. King*, 40 Pa. St. 107; *Newell v. Ingraham*, 15 Vt. 422; *Noyes v. Humphries*, 11 Gratt. 636.)

The amended complaint, while it alleges that Smith was discharged by the plaintiff from his obligation to make the rails, does not directly allege that he was released from the debt; but it was not demurred to, and the plaintiff then and now claims a more liberal construction of its terms. Upon the trial, he offered to prove that John Smith was released from his *contract* with the plaintiff, which the court refused to permit.

Under all the facts disclosed by this record, we are not satisfied with this ruling. The court ought to have permitted the evidence to have been introduced, and the plaintiff then might have been permitted to amend his pleadings so as to make it conform to the facts proved; or if that were not done, or if the evidence failed to show that Smith's debt to the plaintiff was discharged, it would

Points decided.

have been the duty of the court to have instructed the jury to find a verdict for the defendant.

Thinking it probable that the merits of this case were not reached upon the previous trial, we reverse the judgment, and remand the cause for a new trial.

[Filed November 5, 1893.]

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF OREGON, RESPONDENT, v. OREGON
RAILWAY AND NAVIGATION COMPANY, APPEL-
LANT.

17	65
22	357
22	358
19	702
30	75

COMMISSIONERS — BOARD OF — LEGISLATIVE POWERS OF. — A power conferred by the legislature upon a board of commissioners required to be exercised with reference to the affairs of certain corporations will not be extended by implication, and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it, where the legislative assembly of the state passed an act creating a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business within the state, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights or what change in the rate of freight or fares are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable.

- In. — *Therefore held*, that the board had no jurisdiction to require a railroad company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment.
- In. — *Held further*, that where such act directed the board to examine into such affairs, and specially required it to report the result of its investigation concerning specific matters to the legislature, evidently for the purpose of its action thereon, it would not be presumed that the act intended to give the board authority to adjust those matters, although it was empowered by certain provisions therein contained to hear complaints made by persons against railroad companies on account of acts in general done or omitted to be done by them.
- In. — *And held further*, that a provision in the act, to the effect that whenever any railroad company violated, refused, or neglected to obey any lawful order or requirement of the board, to enter complaint in the circuit court of the state, sitting in equity, and that such court should have power, upon

Opinion of the Court—Thayer, C. J.

notice to the company, to proceed to hear and determine the matter speedily, etc., did not authorize such a proceeding in order to enforce the repayment of money charged on freight claimed to be in excess of a reasonable charge; that a claim of that character can only be enforced by a common-law action.

APPEAL from the Circuit Court for the county of Umatilla.

Morton D. Clifford, District Attorney, J. H. Slater, and Tustin & Leisure, for Respondent.

Dolph, Bellinger, Mallory, and Simon, for Appellant.

THAYER, C. J.—The respondent herein instituted a proceeding in said court against the appellant, to require it to refund to one E. J. Summerville the sum of eleven dollars, claimed to be an excess over and above a reasonable compensation, exacted by the appellant from said Summerville, for transporting for him a car-load of wheat from Pendleton to Portland. The respondent was created by an act of the legislative assembly of the state, entitled "An act to create and establish a board of railroad commissioners, and to define and regulate its powers and duties, and to fix the compensation of its members," approved February 18, 1887.

The appellant is a railroad corporation organized under the laws of the state, and maintains a line of railroad between the points mentioned, and at other places within the state. The proceeding was taken under the said act, and the main question presented for the consideration of this court is, whether it authorizes said board to maintain a proceeding to obtain relief of the character claimed therein. I suppose it has become the settled doctrine that the legislature has authority to establish reasonable regulations for the control, in certain particulars, of all corporations whose business is of a *quasi* public charac-

ter, and that, to enable it to exercise such authority prudently and intelligently, it may provide for an inspection of the affairs of the corporation which concern the general community. This authority arises out of the principle that such institutions enjoy privileges and franchises created for the benefit of the public, and is exercised in order that the public may not fail to receive it. Such regulations must not be arbitrary or capricious. Their aim and object must be to promote the welfare of society; otherwise they cannot be enforced. The legislature has the right to judge as to when the public necessity requires the adoption of such measures, but the courts may determine whether a particular regulation is a reasonable exercise of the power.

It is difficult to ascertain, from an examination of said act, what power the legislature conferred upon the said board. Counsel for the appellant claims that no power whatever has been conferred upon it, except to find out as to the freights and fares charged by common carriers, and certain other facts, and report the same to the legislature.

Section 9 of the act provides that "said board may inquire into, ascertain, and report to itself the method by which the accounts of corporations operating railroads or street railways are kept."

Section 10 provides that "the board shall make a biennial report to the legislative assembly, including such statements, facts, and explanations as will disclose the actual workings of the system of railroad transportation of freight and passengers, and its bearings on the business prosperity, etc., with suggestions in relation thereto, etc., as to them may seem appropriate. They shall also, at such times as they may deem advisable, examine any particular subject connected with the condition and management of railroads, and report to the legislative assembly their doings thereon and their reasons therefor."

Section 11 provides that "said commissioners shall examine into the condition and management of all other matters concerning the business of the railroads of the state, so far as the same affect or relate to the interests of the public, and to the accommodation and security of passengers or persons doing business therewith, and whether such railroad companies or corporation, their officers, etc., comply with the laws of this state now in force or which shall hereafter be in force concerning them, and such other matters as they may deem important; and for such purpose said commissioners shall have the right to examine all the books, etc., of any railroad company or corporation in this state, and they shall have power to examine, under oath, etc., any and all directors, etc., of any such railroad corporations, and any other person, concerning any matter relating to the condition and management of the business of such company or corporation."

Section 12 provides that "any person, etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts, whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the

duty of the commission to investigate the matter complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 13 provides that "whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured, and such finding so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found. All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

Section 14 provides that "if, in any case in which an investigation shall be made by said commission, it shall be made to appear to the satisfaction of the commission, etc., that anything has been done or omitted to be done, in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved, in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its reports in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injuries so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made

to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

Section 15 provides that "whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to enter complaint in the circuit court of the state, sitting in equity, in the judicial district in which the violation or disobedience of such order or requirement shall arise, alleging such injury, and the said court shall have power to hear and determine the matter at any time after service of the complaint, in the usual way, on such short notice to the common carrier complained of as the court shall deem reasonable, and said court shall proceed to hear and determine the matter speedily, in such manner as to do justice in the premises; and on such hearing, the report of said commission shall be *prima facie* evidence of the matter therein stated, and if it be made to appear to such court on such hearing that the lawful order or requirement of said commission exercised in pursuance of the provisions of this act has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience, and enjoining obedience to the same; and in case of any disobedience of

any such writ of injunction, or other proper process, mandatory or otherwise, it shall be enforced by proper process issued out of said court."

Section 17 of said act provides to the effect that whenever the commissioners deem that repairs are necessary upon any railroad, or an addition to or a change of its stations or station-houses, or change in its rates of fares for transporting freight or passengers, or in the mode of operating its road and conducting its business, they shall in writing inform the corporation of the improvements or changes which they consider proper, and a report of the proceedings of compliance or of a refusal to comply with such suggestions shall be included in their biennial report to the legislative assembly.

Section 18 of the act requires the board to investigate the causes of any accident on any railroad resulting in loss of life, and invests it with discretionary power to investigate any accident on such road.

Section 19 requires every railroad company or corporation, on request, to furnish said board any information required by it concerning the condition, management, and operation of the road or business of such company or corporation.

Section 20 of said act provides that the board may prescribe the form of the annual statement required to be transmitted to the secretary of state by every company or corporation owning or operating a railroad in this state provided for by act of the legislative assembly of the state of Oregon, approved February 26, 1885, and empowers the board to make changes and additions to such form, and requires it to examine such statements when filed, and if the same be defective or appear erroneous, to notify the corporation to correct it.

Section 22 of said act provides that in case any railroad company or corporation refuses to submit its books, etc.,

to the examination of the board, or to furnish the information provided for in the act, or fails, neglects, or refuses to do or perform any of the requirements of the act, it shall forfeit and pay to the state of Oregon for every such offense a sum of not less than one hundred dollars nor more than five hundred dollars, to be recovered in an action in the name of the state of Oregon against such company or corporation.

And section 23 of the act empowers the board to enter the cars, depots, stations, and other places of business of such corporations, for the purpose of inspecting the same, and to observe the manner and methods in which the business of such corporations is done.

These sections of the act contain, so far as I am able to discover, all the provisions bearing upon the question submitted, and it must be ascertained from them whether the proceeding can be maintained or not. The main object of the act was to ascertain the condition of railroad affairs in the state, and the manner in which they are being conducted. Sections 9, 10, and 11 thereof clearly indicate that such was its purpose. Said sections endow the board of commissioners created by the act with ample power to investigate the subject. This was obviously done in order to enable the legislature to judge as to whether the railroad management was such as was calculated to conserve the best interests of the public, whether the public were being dealt fairly with by those in charge of such management, and whether changes could not be made which would be beneficial to the community. The state has an interest in such matters, and it is highly proper that the legislature should inquire into them; and should it ascertain that the railroad companies were pursuing a selfish, mercenary course, and disregarding the rights of their patrons, it could provide suitable regulations to remedy the mischief. Whether a railroad company is

employing suitable means and appliances for the transportation of freight and passengers over the line of its road with reasonable safety and dispatch, and as cheaply as it can afford to do, and obtain a fair profit, in view of the amount of its investment, is always a pertinent subject of inquiry for the legislature; and the object of the act, it seems to me, from the general spirit and tenor of it, in creating the board of commissioners and clothing it with the functions it possesses, was for the purpose of making such inquiry.

I cannot conclude that the legislature undertook to correct the abuses of railroad companies before it could know with any certainty whether they had been committed. It would not be likely to appoint a commission for execution, to precede one of inquiry, nor that it would delegate its discretion in so important a matter to an inferior board, to be exercised.

The railroad enterprises in this state are as yet in their infancy. The people are greatly interested in having them extended into every district where marketable articles are produced, and it would be very unwise, as well as unjust, to pursue a rash and narrow policy towards them.

It is not contended on the part of the respondent that said act invested the board of commissioners with authority to fix the rate to be charged for the transportation of freight or passengers, nor, as I view it, were they empowered to determine what charges were reasonable or unreasonable. They were required to make a biennial report to the legislative assembly, with such suggestions "as to what changes in the classification of freights, or what change in the rates of freight or fares, are advisable for the public welfare." (Section 10 of act; also section 17.)

This is the only provision in the act I have been able to find which imposes any duty upon the board in regard to rates and fares.

Section 12 of the act requires the board to investigate complaints made by certain persons against common carriers subject to the provisions of the act, on account of anything done or omitted to be done by any such common carrier in contravention of its provisions.

Section 13 makes it the duty of the board to make a report of an investigation made by it, including findings of fact upon which its conclusions are based.

Section 14 makes it the duty of the board, in any case in which an investigation is made, and it appears to the satisfaction of the board that anything has been done or omitted to be done in violation of the provisions of the act, or of any law of which the board has cognizance, by any common carrier, or that any injury or damages have been sustained by the party or parties complaining, or by other parties aggrieved, in consequence of any such violation, to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, etc.

And section 15 makes it the duty of the board, whenever any such common carrier shall violate, or refuse, or neglect to obey any lawful order or requirement of the board, to enter complaint as therein provided.

Neither of these sections, however, specifies the particular subjects to be investigated, nor what acts done or omitted to be done by such common carrier would be a violation of the act, or of the law of which the board has cognizance, or what would be a lawful order or requirement of the board; nor does any section of it indicate what law the board has cognizance of.

The result is, that the act is hopelessly ambiguous as to the jurisdiction of the board beyond the authority before referred to. It has power in conducting its investigations to compel railroad companies to furnish it information as provided in section 19 of the act, and also to compel them to adopt such form of annual statement

required by the act of February 26, 1885, to be transmitted to the secretary of state as it may prescribe by virtue of section 20 of the act. But an attempt on the part of the board to adjust claims between railroad companies and persons, firms, corporations, or associations, etc., and to enforce obedience to its orders made in respect thereto, in the manner specified in section 15 of the act, would be groping in the dark.

The first question arising would be, What contention between the railroad company and such persons, firms, etc., has it jurisdiction of? The answer to that question cannot be left to speculation. The jurisdiction of such commissions is not given by implication. Commissions of that character are mere creatures of statute, and possess no power except what the statute expressly confers upon them.

Again, if the board had jurisdiction to investigate complaints for overcharges on freight, its order to refund the excess could not be enforced in the manner provided in section 15 of the act. The recovery of money unjustly exacted in such cases is a common-law remedy, and the party against whom the claim is made, whether a natural person or a corporation, has the right to a trial by jury before its repayment can be enforced.

A summary remedy of the character of the one provided for cannot be used to enforce a claim for damages arising *ex contractu* or *ex delicto*, although it might be employed to compel the performance of a specific duty necessary to the administration of public affairs.

The several sections of the act, taken together, present an incongruity, and leave an impression that it was made up by a sort of patchwork. Sections 9, 10, 11, and 17 clearly indicate that the object of the investigation of the affairs of railroad corporations is for the purpose of ascertaining facts to be included in the biennial report

which the board is required to make to the legislative assembly; while it might be inferred from sections 12, 13, and 14 that its object was to constitute the board a kind of tribunal of conciliation to adjust the claims of persons against the railroad companies, and to establish *prima facie* evidence of their validity; and section 15 makes a very lame attempt to compel satisfaction of them.

What kind of claims it was intended the board should adjust and require to be satisfied does not appear. If its jurisdiction, however, in that particular, is co-extensive with its authority to investigate such affairs, it must necessarily extend to claims arising out of torts as well as contracts, as it is required by section 18 of the act to investigate the causes of any accident on any railroad resulting in the loss of life, and of any accident not so resulting, which it may deem proper to require investigation.

Under this view, the board would be the most important tribunal in the state. It could adopt its own code of procedure, formulate its own rules of evidence, be unembarrassed by the presence of a jury, and adjudicate in accordance with its own caprices, and if its orders or requirements were violated, or refused, or disobeyed, it could enter complaint in the circuit court, "sitting in equity," and have a mandatory process issued to enforce them.

It cannot be presumed that any legislature would confer so important a prerogative upon a board of commissions, still we must conclude that it was done in the present case, if we sustain the view that the authority of the board to adjust matters between persons and railroad companies is co-extensive with its authority to investigate them. The counsel for the respondent does not claim that the board has jurisdiction to the extent suggested,

but I fail to discover any point short of it to stop, if it is conceded that the jurisdiction includes the matters involved in the present case. It will not be contended that the act gives the board jurisdiction in express terms to determine when freight charges are unreasonable; and if the question is left to inference, there is no limit to the extent of its jurisdiction, except the limitation of its authority to investigate, and that seems to extend to all the affairs between the railroad corporations and individuals or associations, and to involve every breach of duty of the former and the consequences attending it.

It has for a long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act.

There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left, serious disturbances might arise, involving a conflict of jurisdiction which would be highly detrimental to the community.

It is not, it seems to me, requiring too much of the legislative branch of the government to exact, when it creates a commission and clothes it with important functions, that it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent.

Under the view we have indicated in the foregoing opinion, it follows that the judgment appealed from must be reversed, and the complaint dismissed, and it is so ordered.

[Filed November 20, 1888.]

**MAIN & WINCHESTER, RESPONDENTS, v. CHARLES
MESSNER, APPELLANT.**

INSOLVENCY — DISCHARGE OF INSOLVENT — EFFECT OF AS AGAINST FOREIGNER NOT PARTY TO PROCEEDINGS. — A discharge in insolvency by an insolvent court of this state to one of its citizens is no bar to an action brought by a citizen of another state in the courts of this state when such creditor was not a party to the insolvency proceedings.

R. & E. B. Williams, for Respondents.

Cox, Smith, and Teal, for Appellant.

LORD, J. — This is an action to recover money on account for goods sold and delivered by the plaintiffs to the defendant. To settle the question in controversy on demurrer, the defendant alleged in his answer that the plaintiffs were citizens of the state of California, and then set up as a defense in bar of the action his discharge under the insolvent laws of this state. It is admitted that the plaintiffs did not appear, nor were parties to the insolvency proceedings in any manner or form by which they have estopped themselves from denying the validity of such proceedings. The only question raised is, whether the discharge of the defendant from his debts, under the insolvent law of this state, is a bar to the action.

The argument for the defendant is, that the plaintiffs by bringing their action in the courts of this state submitted themselves to the *lex fori*, and will not be permitted to deny in such courts the legal effect of the discharge under our insolvent laws. The language of his counsel is, that "this discharge is given by a state court, and the plaintiffs should not be allowed to come into the same court and disregard that decree."

It is too plain for argument that the fact of bringing the present action in the state court did not have the

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effect to confer jurisdiction over the plaintiffs in the insolvency proceedings. How, then, and on what principle, can any order or decree rendered therein operate to estop the plaintiffs or affect their legal rights in this action?

We are answered by counsel for the defendant in this wise: He says that in *Ogden v. Saunders*, 12 Wheat. 23, and afterwards approved in *Suydam v. Broadnax*, 12 Pet. 75, and in *Baldwin v. Hale*, 1 Wall. 232, it was held that "a certificate of discharge under such a law cannot be pleaded in bar of an action brought by citizens of another state in the courts of the United States, or of any other state than that where the discharge was obtained." And consequently, under that ruling, it is of no importance that the court did not acquire jurisdiction over the plaintiffs in the insolvency proceedings, as the defendant or any debtor can always plead in bar the discharge of the courts of the state where obtained.

If this be a fair deduction from the language stated, it is not supported by the case or cases in which it is employed. In *Ogden v. Saunders*, *supra*, as finally disposed of by Mr. Justice Johnson, the judgment was distinctly put upon the ground that a discharge in insolvency under a state law could not bind the citizens of another state over whom the court granting the discharge had no jurisdiction. He said: "The question now to be considered is, whether the discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of *another* state who has never voluntarily subjected himself to the state laws otherwise than by the origin of his contract. And in the discussion of this question, among other things he says: "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected are entitled to a hearing. Hence any bankrupt or insolvent system professes to summon the creditor before some

tribunal to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights, and on the subject of those rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate."

And as a result of his reasoning he concludes as follows: "I therefore consider the discharge under a state law as incompetent to discharge a debt due a citizen of *another* state, and it follows that the plea of discharge here set up is insufficient to bar the rights of the plaintiff."

It is thus seen that the whole tenor of the discussion is devoted to showing that the state insolvent laws cannot have any extraterritorial force,—that state courts in insolvency proceedings under such laws cannot by their order or decrees affect citizens of another state who have not voluntarily submitted themselves to its jurisdiction, and consequently that such orders of discharge, as against them, are nullities, and cannot be pleaded in bar of their rights. The authorities to this point, both national and state, are quite unanimous and decisive.

In *Baldwin v. Hale*, *supra*, the court say:—

"Regarded merely in the light of principle, the rule is one which could hardly be defended, as it is quite evident that the courts of one state would have no power to require the citizens of another state to become parties to any such proceeding. . . . Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation, and consequently the tribunal setting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, *has no jurisdiction* in the case. Legal notice cannot be given, and

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consequently there can be no obligation to appear, and of course there can be no legal default." (See also *Newton v. Hagoman*, 10 Saw. 461; *Van Glahn v. Varrenne*, 1 Dill. 519; *Sloan v. Cheneguy*, 22 Fed. Rep. 215.)

To the same effect are the state decisions.

In *Pratt v. Chase*, 44 N. Y. 599, the court say:—

"It must be accepted as a settled principle in this state that its insolvent laws are binding upon such persons only as are citizens of the state at the time the debt is contracted, except in cases where foreign creditors make themselves parties to the proceeding under the insolvent laws of the state by accepting dividends, becoming petitioning creditors, or in some other way appearing and assenting to the jurisdiction, and become estopped from denying the validity of such proceeding." And again: "All the cases agree that the insolvent laws of the state are obligatory upon all citizens of the same state. As to creditors of the insolvent who are not citizens of the same state where the discharge is granted, the want of binding force to defeat the obligation of a contract is *founded upon the want of jurisdiction over such creditors*." (*Soule v. Chase*, 39 N. Y. 343; *Lester v. Christlar*, 1 Daly, 29; *Drunnelly v. Corbett*, 7 N. Y. 500.

In *Hawley v. Hunt*, 27 Iowa, 307, the court say:—

"The settled doctrine now is, that a debt attends the person of the creditor, no matter in what state the debt originated or is made payable; that a creditor cannot be compelled by a state of which he is not a citizen or resident to become a party to insolvent proceedings therein; that such proceedings are judicial in their nature, *so that jurisdiction over the person of the creditor is essential*; that notice is requisite to jurisdiction in such cases, and can no more be given in insolvent proceedings than in personal actions where the party to be notified resides out of the state; and hence a discharge under a state insolvent

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law will not and cannot discharge a debt due to a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court by becoming a party to the proceedings or claiming a dividend therein."

In *Bedell v. Scruton*, 54 Vt. 493, the court say:—

"It must now be regarded as settled beyond question that a discharge granted by a state court of insolvency is no bar to the claim of a non-resident creditor who does not take part in the insolvency proceeding, or submits himself in any way to the jurisdiction of the insolvency tribunal; nor is the rule affected by the place where the contract is made or to be performed, or the form in which it is sought to be enforced. The debt attends the person of the creditor, and *unless he is within the jurisdiction of the court, no discharge granted by it can affect his rights.*"

In *Hill v. Carlton*, 74 Me. 156, the plaintiffs, citizens of Massachusetts, brought an action upon an account, against a defendant of Maine, in the court of that state. While this action was pending, the defendant procured his discharge in insolvency, and pleaded the same in the defense of the action, but the court held it to be no bar to the plaintiffs' right to recovery. (See also *Rhodes v. Borden*, 67 Cal. 8; *Poe v. Duck*, 5 Md. 1; *Beer v. Hooper*, 32 Miss. 246; *Anderson v. Wheeler*, 25 Conn. 603; *Crown v. Coons*, 27 Mo. 512; *Kelly v. Drury*, 9 Allen, 27.)

"No state," said Judge Story, "can introduce any system which shall extend beyond its territorial limits and the persons who are subject to its jurisdiction. Creditors residing in other states cannot be bound by its laws." (Story on Constitution, sec. 1108.)

The fact is,—and no principle is more elementary,—that all state laws are confined in their operations to its territorial limits, and that it is not in the power of its legislature to give them any extraterritorial force and effect, and, as the authorities indicate, this is particularly

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true of state insolvent laws. Nor upon principle can it be otherwise. Under any insolvent system there must be some kind of judicial proceedings before any order or decree can be rendered discharging the insolvent from liability. That order or decree, to be valid and operative, must be supported by jurisdiction over the person or the thing, otherwise it is a mere nullity. As the debt attends the person, there can be no jurisdiction of it unless the non-resident creditor submits it to the court and claims a dividend.

If, then, the non-resident creditor does not voluntarily submit himself to the court in which the insolvency proceedings are pending, nor his claim for a dividend or distribution of the insolvent's estate, no order or decree of discharge which such court may render can extinguish his debt or affect his right to its recovery. There being neither jurisdiction of him or his debt, the decree is a mere nullity so far as it professes to discharge his debt. To hold otherwise would be to condemn him unheard, and to appropriate his property "without due process of law." This being so, the question in such cases—the discharge of the insolvent being otherwise valid—is simply one of jurisdiction, and the forum in which the remedy is sought cannot affect the principle or alter the rule.

As the plaintiffs did not voluntarily submit themselves to the jurisdiction of the court in insolvency, or in any way participate in its proceedings, either by uniting in the application for the defendant's discharge, or by submitting their claim and accepting a dividend from his estate, it results that there was no jurisdiction over them, and that the debt which the defendant owed was not extinguished by his discharge in such insolvency proceedings, and consequently that the defendant cannot plead such discharge in bar of the plaintiffs' right of recovery; and therefore the judgment must be affirmed.

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[Filed November 20, 1888.]

E. C. CROSS, ADMINISTRATOR DE BONIS NON WITH WILL ANNEXED OF G. J. BASKETT, DECEASED, ET AL., APPELLANTS, v. MARY L. BASKETT, AS ADMINISTRATRIX OF W. A. BASKETT, DECEASED, RESPONDENT.

ADMINISTRATOR OF ADMINISTRATOR, WHEN NOT LIABLE TO ACCOUNT.—

W. A. B. was administrator with will annexed of G. J. B., deceased. He filed his final account as such, but before he obtained an order discharging him from his trust, he died. Mary L. B. qualified as administratrix of W. A. B., deceased. E. C. C. qualified as administrator *de bonis non* with will annexed of G. J. B., deceased, and then filed the petition in this case. *Held*, that where it is not charged that any of the property or assets of G. J. B., deceased, came into the possession or under the control of Mary L. B., she cannot be called upon to file an account; that her trust as administratrix of W. A. B., deceased, does not create the duty to file an account in the estate of G. J. B., deceased.

[ON REHEARING. — FILED MARCH 12, 1889.]

DECREE APPROVING FINAL ACCOUNT OF EXECUTOR. — A decree approving the final account of an executor or administrator is only primary evidence of the correctness of the account as thereby settled and allowed. (1 Hill's Code, secs. 674, 1175.) Such decree is not conclusive, but *prima facie* evidence only.

APPEAL from Polk County.

George G. Bingham and *Warren Truitt*, for Appellant.

Daly & Butler, and *C. A. Johns*, for Respondent.

STRAHAN, J.—So far as is necessary to a proper understanding of the questions presented by this record on this appeal, the facts are as follows: In the year 1882, G. J. Baskett was a resident of Polk County, Oregon, and owned property therein, and died in the state of California; that before his death he made and published his last will and testament; that in and by said will, S. T. Burch was named sole executor thereof, and that he refused to

accept said trust; that said will was duly admitted to probate in Polk County, and W. A. Baskett appointed administrator of said estate with the will annexed. It further appears that said administrator with the will annexed proceeded with the administration of said estate, and on the fourteenth day of November filed what purported to be his final account. It does not appear whether the county court of Polk County, where said proceedings were pending, made an order directing notice to be given in the manner required by section 1173 of the code, or not; nor does it appear what order or decree said court made in relation to said account, but it does appear that such administrator made some payments to the devisees under the will, the amounts of which were evidently derived from this account.

No order was ever made discharging said W. A. Baskett from his trust. On the seventeenth day of February, 1887, said W. A. Baskett died intestate in Polk County, Oregon, leaving the defendant, Mary L. Baskett, his widow, surviving him, but he left no children; that said Mary L. Baskett was duly appointed administratrix of the estate of W. A. Baskett, deceased, by the county court of Polk County, Oregon, which administration is still pending; that on the twenty-second day of August, 1887, the plaintiff E. C. Cross was duly appointed administrator *de bonis non* of the estate of said G. J. Baskett, deceased, and is now acting as such administrator; that said Mary L. Baskett has in her possession and control, as assets of the estate of her said husband, property amounting in value to \$6,750, which she claims to own as his sole legal representative; that there are other and large amounts of money and other property belonging to said estate not accounted for by said W. A. Baskett as administrator aforesaid, but which was converted by him, and which said items cannot be more fully stated by your petitioners, for the reason

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that the memorandum thereof is in possession of parties who will not disclose the facts concerning the same unless compelled to do so by the process of a court lawfully empowered to issue process and compel their attendance and examination. It nowhere appears that such memorandum is in the possession of the defendant, or that any of the property or assets of the estate of G. J. Baskett, deceased, ever came into her possession or under her control.

The first question presented for our consideration is, whether or not the county court of Polk County had authority to cite an administrator of an administrator's estate to file an account of the first administration, where it is not charged that any of the property of the first estate came into the possession of the second administrator.

Counsel for respondent did not appear upon the argument, nor did they file a brief; and appellant's counsel cited no authorities on the question; but it is a question of jurisdiction, and if the jurisdiction invoked does not exist, it ought not to be assumed. It must be conceded that there is no statute in this state expressly conferring such jurisdiction upon the county courts, and without a statute conferring it, I do not think its existence can be assumed. (*Bush v. Lindsey*, 44 Cal. 121; *Wetzler v. Keenan's Executor*, 52 Cal. 638; *In re Fithian*, 44 Hun, 457, note; *Ranney's Estate*, 66 How. Pr. 291; *Redfield's Law and Practice of Surrogates*, 100; *Schenck v. Schenck's Executors*, 3 N. J. L. 149.)

The only statute that I have been able to find that relates to this subject is section 1099 of the code, and is as follows: "The surviving or remaining executor or administrator; or the new administrator, as the case may be, is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit, or proceeding on account thereof against the

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executor or administrator ceasing to act, or against his sureties or representatives."

If the petition had alleged that property of the estate of G. J. Baskett was in the possession of the defendant, this section is broad enough in its terms to authorize the proper proceeding to compel its delivery to the plaintiff; but where the plain object of the proceeding is not to compel the delivery of particular property or assets, but simply to file an account of matters of which the defendant may have no knowledge whatever, it seems to me to be beyond the authority conferred by the statute.

Under this section the plaintiff may maintain any necessary and proper action, suit, or proceeding, but this is neither. It simply seeks an account from a person who is not shown to have any property or effects of petitioner's testator in her possession or under her control. Such an account, if filed by respondent, would not and could not disclose the true condition of the estate of G. J. Baskett, nor could it be a foundation for subsequent proceedings in said matter. To be of any legal force or effect it must emanate from a person who may be legally required to file the same, and not from a mere stranger.

The conclusion reached renders it unnecessary to consider the other questions presented on the argument.

The decree of the court below must therefore be affirmed.

ON REHEARING.

STRAHAN, J. — Counsel for appellants have filed an elaborate petition for a rehearing, which has received a careful examination by the court. We have not deemed it necessary to pass upon the question of parties raised by the demurrer, for the reason it had no influence in reaching the conclusions already announced, nor is it important in the case. Nor did we deem it necessary to pass upon the power of the county court after the term to set aside or

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vacate a final accounting made by an executor or administrator or the decree approving it, for the reason such decree is only primary evidence of the correctness of the account as thereby settled and allowed. (1 Hill's Code, sec. 1175.) And primary evidence is that which suffices for the proof of a particular fact until contradicted or overcome by other evidence. (1 Hill's Code, sec. 674.)

Under these sections of the code, a decree approving a final account is not conclusive, but *prima facie* evidence only. Besides, after an executor has settled an estate after notice to all persons interested, and especially after his death, the burden of proving error ought to be shifted to those who assail it.

Undoubtedly, if W. A. Baskett, at the time of his death, was indebted to the estate of G. J. Baskett, deceased, the administrator of the latter estate might present a claim against the estate of the former, and prosecute it to payment like any other claim; or he might probably, after a proper accounting in the county court, and the failure of the sureties of the deceased administrator to pay, maintain the proper action on the bond of the deceased administrator, and recover such damages as the estate he represents has sustained by reason of the alleged defaults of his predecessor. But these are matters upon which the court does not now express an opinion, further than to say that the appellant is not without remedy if W. A. Baskett failed in his duty as executor of his father's will. But on the record before us, we are satisfied with the opinion already announced, and it must be adhered to.

Let the petition for a rehearing be overruled.

Points decided.

[Filed November 22, 1888.]

JOSEPH LIGGETT ET AL., APPELLANTS, v. W. S.
LADD ET AL., RESPONDENTS.

17	89
23	40
21*	133
31*	85

17	89
44	587

UNINCORPORATED ASSOCIATION — RIGHT OF ONE TO SUE FOR ALL. — One or more of the members of an unincorporated association may sue for the benefit of the whole, to enforce a right in favor of the association which is cognizable in equity, where the members comprising it are so numerous that it would be impracticable to bring them all before the court.

RELIGIOUS DOCTRINE — RIGHT TO TEACH INCLUDES RIGHT TO ACQUIRE PROPERTY. — The right to believe and teach religious doctrines includes the right to organize churches, establish seminaries of learning, and acquire property for that purpose, and to claim the protection of the civil law in the enjoyment of such right.

TRUSTEE — MAY HOLD PROPERTY FOR VOLUNTARY ASSOCIATION — CORPORATION AS TRUSTEE. — Mere voluntary associations are incapable of taking and holding real property in their society name; but it may be held for their use and benefit through the intervention of a trustee, who may be a natural or artificial person. When, therefore, an incorporated religious association procured through other parties the formation of a corporation for literary purposes, the charter of which contained a provision that its object was to acquire and hold property in trust for such association, and that its trustees should be appointed by the representatives of the latter: *held*, that property subsequently conveyed to it, unless the deed of conveyance limited it to a different use, must be deemed to have been taken in trust for the association; and where the legislature in providing for a college, the leading object of which should be to teach such branches of learning as are related to agriculture and the mechanic arts, in compliance with the provisions of the act of Congress granting public lands to the several states and territories which might provide colleges for that purpose, passed July 2, 1862, designated and adopted the said corporation as the Agricultural College of the state, in which all students should be instructed in accordance with the requirements of said act of Congress, and the corporation accepted such designation and adoption, in pursuance of a requirement of the legislature: *held*, that the relations of the corporation to the religious association were not thereby changed; that the state, in consequence of such act and acceptance, was not authorized to alter the charter of the corporation, or interfere with the right of the association to manage property conveyed to the former, as provided in the charter; nor that the designation of the corporation as such college created a new entity, or changed its character as trustee of the property held by it for the benefit of the association. *Held, further*, that a deed to land subsequently executed to the corporation, which contained a provision to the effect that the premises be used by it for the purposes of the Agricul-

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tural College of the state, and that when they should cease to be so used, they should vest and become the property of the persons who had or should contribute the purchase-money, did not impress a trust upon the premises in favor of such college; that the latter, as distinct from the corporation, was only ideal; that said provision in the deed referred to created a conditional limitation in favor of the persons who contributed the purchase-money, and that the trustees of the corporation could not rightfully convey the land contrary to the will of the association.

APPEAL from the Circuit Court for the county of Benton.

George H. Williams and J. K. Kelly, for Appellants.

James F. Watson and John Burnette, for Respondents.

THAYER, C. J.—The appellants as plaintiffs brought suit against W. S. Ladd and others, regents of the State Agricultural College of the state of Oregon, under the act of February 11, 1885, and the Corvallis College, alleging in their complaint the following facts: That they were members in good standing of the Methodist Episcopal Church South, of the state of Oregon, and brought the suit for themselves, as members of said church, and for other members thereof, in the state; that said church was an unincorporated religious association, embracing in its membership a large number of persons in various parts of the state, with societies, churches, and ministers devoted to the support and spread of the Christian religion; that the Corvallis College was an educational institution located at Corvallis, Oregon, and duly incorporated under the laws of the state, and the other defendants were persons claiming to be and assuming to act as the board of regents of the State Agricultural College of the state of Oregon; that said Corvallis College was duly incorporated under the laws of the state on the twenty-second day of August, 1868, by certain persons or trustees; that by the second article of the articles of incorporation of said college, it is provided as follows: "The object of

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this incorporation is to acquire and hold property in trust for the Methodist Episcopal Church South in the state of Oregon, and to endow, build up, and maintain an institution for educational purposes, and to confer all such honors, distinctions, and degrees as are usual in colleges to be conducted and carried on under the direction and control of the trustees aforesaid, and their successors in office; *provided*, that said college shall be strictly a literary institution." Article 6 thereof provides as follows: "The trustees as aforesaid were appointed by the Columbia Conference of the Methodist Episcopal Church South at their last annual meeting, and their successors will be appointed at the next annual meeting of said conference, and so on in perpetual succession, according to the laws, customs, and usages of said church"; that on the third day of January, 1876, the trustees of said Corvallis College duly appointed by said conference made and filed supplementary articles of incorporation, adding to said second section the following: "And with full power and authority to make, execute, and deliver checks, promissory notes, and bills of exchange for the purpose of paying the debts of said institution and purchasing property necessary for the same; and to make, execute, and deliver deeds and mortgages of all or any of the property of said institution, when the same shall be sold or mortgaged; and to sell any and all property belonging to said college when the same shall be deemed unsuitable; and to purchase and hold other property of any name and nature necessary and suitable to the complete success and purpose of said institution not exceeding the sum of five hundred thousand dollars"; that on the twenty-first day of December, 1870, the legislative assembly passed an act designating and permanently adopting said Corvallis College as the Agricultural College of the state, with a provision in the act that the college should accept the same

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and be bound thereby; that on the twenty-ninth day of October, 1870, said Corvallis College duly accepted the act, and has since kept and observed all its provisions; that since said college was so made the Agricultural College of the state, it has been receiving students, and educating and fitting them for agricultural pursuits according to the laws, regulations, and usages applicable to an agricultural college, and large contributions of property and money have been made by the members of said church, and others, for its support as the Agricultural College of the state; that on the eleventh day of April, 1871, George Roberts and wife, for the consideration of four thousand five hundred dollars to them paid, sold and conveyed, by deed duly executed, to said Corvallis College certain real property consisting of 34.85 acres of land, situated in said county of Benton; said deed contains the following provisions: "And this conveyance is made to said Corvallis College to the end that the premises be used by said college as an agricultural farm in connection and for the purpose of the Agricultural College of the state of Oregon. Now, whenever said premises shall cease to be used or occupied for the purposes of said Agricultural College, then the said premises shall vest and become the property of the several persons who have or shall contribute the purchase-money, in the proportions contributed by each person." That said purchase price of said property consisted of moneys contributed for the purchase of it as aforesaid, by members of said church, and others; that at the annual session of the said Columbia conference, held in Albany on the tenth day of September, 1885, Robert L. Buchanan and eighteen others were duly appointed by said conference as trustees of said college, as provided in said articles of incorporation; that said persons were and continued to be the lawfully appointed and acting trustees of said college until the fifteenth day of September, 1886;

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that said conference, at the same session, duly adopted a resolution, declaring, in effect, that no change should be made by the trustees of said college affecting its rights or standing as the Agricultural College of the state of Oregon, which conference was and all times has been the duly authorized representative of said church, according to its regulations and usages; that on the fifth day of February, 1886, a majority of the said trustees, with a full knowledge of the said action of said conference, passed the following resolution, to wit: "That the president and secretary of this board be ordered to deed the college farm—referring to the land conveyed to the college by Roberts and wife—to the state of Oregon or its constituted authorities; that on the twentieth day of February, 1886, the acting president and secretary of the college, in its name, and in pursuance of said resolution, executed such deed to such regents as aforesaid, without any consideration therefor, or consideration or benefit to said college, and with full knowledge by such regents of the trust set forth in the complaint.

It was alleged in the complaint that said regents, at the time said deed was so executed to them, were not and never have been a lawful or corporate body, or had had capacity to take or hold the property described in the deed; that the Corvallis College received and held the property in trust for the appellants and the other members of the said church; and that the said resolution and the said deed were in violation of said trust, and contrary to the known and expressed will of said church, and, if held valid, will work irreparable injury to said college as the Agricultural College of the state, and will weaken the influence and power of said church for educational and religious purposes; that the persons named as defendants in the complaint belonged to the board of regents as constituted under said act of 1885; that they denied the alleged

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trust, and that said deed of the twentieth day of February, 1886, was a cloud upon and an injury to the rights of the appellants and the other members of the said church; and that said Corvallis College was unwilling to execute the trust alleged in the complaint without a judicial determination that the said deed had no force or effect.

The relief demanded in the complaint was, that the said deed last referred to be set aside. To this complaint the respondents, Ladd and others, interposed a demurrer, upon several grounds, among which were, that the appellants had no right to bring the suit, and that the Methodist Episcopal Church South had no interest in the subject-matter of the suit. The circuit court sustained the demurrer on both of these grounds, and from the decree entered thereon this appeal was taken.

Whether the appellants had a right to bring the suit depends upon the question of their having an interest in the subject-matter of it, cognizable in equity. They could maintain such an interest in no other way than by a suit in the form of the one brought. The right which the appellants claimed had been violated belonged to them as members of a particular association, but as the association was not incorporated, it could not sue, and the various members comprising it were evidently so numerous that it would have been impracticable to bring them all before the court in one suit. The law, in such cases, permits one or more to sue or defend for the benefit of the whole. (Code, sec. 385.)

It is unnecessary, therefore, to consider any other question in the case than the one appertaining to the rights of the appellants as members of the said religious association. The right of mankind to believe and teach such doctrines regarding religion as meet the approval of their consciences is recognized under our form of government as inherent; it is freely accorded to every sect

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and denomination in the land, and is so interwoven with the principles which underlie our political fabric that it cannot be taken away without the general consent or a violent revolution. The law not only tolerates the privilege, but protects every one in the enjoyment of it. The people are entitled, as an incident of such right, to form associations, adopt creeds, organize churches, and establish seminaries of learning for the advancement of their peculiar tenets of faith, and to acquire property and erect buildings to aid them in accomplishing that end.

Mere voluntary associations, however, cannot take the title to real property in their society name, as they are not in law regarded persons, but it may be held for their use and benefit by trustees, and their right to the enjoyment of the property be secured in that way. Such trustees, as I view it, may be artificial persons as well as natural ones. If this is correct, then, while the Methodist Episcopal Church South could not, in consequence of its being unincorporated, take the legal title to real property, yet it could secure the benefit of the property by having the legal title to it conveyed to a corporation for its use.

Such is the course which seems to have been pursued by the church in the establishment of a literary institution at Corvallis. It caused the formation of a corporation known as the "Corvallis College," and a provision to be inserted in its charter that the object of the incorporation was to acquire and hold property in trust for the Methodist Episcopal Church South in the state of Oregon. It also, in order to secure a faithful execution of the trust, caused a further provision to be inserted therein to the effect that the trustees of the college should be appointed by its conference.

By the incorporation of the college, it became a distinct legal entity; yet it was the mere offspring of the church,—an instrument employed by the latter "to endow, build

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up, and maintain an institution for educational purposes." It received its life and inspiration from the church, and was one of the agencies which the latter made use of to perform its mission. The college had no will of its own; it had no power to act independently of the church; it was capable of taking and holding the title to real property only in trust for the church. It cannot be consistently contended that the college, prior to the execution of the Roberts deed, owned any property except in the manner indicated; and, unless it can be maintained that it acquired and held the property described in that deed in a different capacity from that in which it held the other property, we must conclude that it held that in the same manner as the other, in trust for the said church.

Counsel for the respondents have attempted to show that the college held the Roberts property independently of the church. They claim that an express trust was impressed upon the property by the said deed; that it was devoted by that instrument to the use and purpose of the Agricultural College of the state of Oregon, and that the church could not divert it to a different purpose or exercise control over it in any manner.

It will be observed that, prior to the time of the execution of the deed to the property, the legislative assembly passed the act designating and permanently adopting the Corvallis College as the Agricultural College of the state, subject to its acceptance of the provisions of the act, and that it had duly accepted them.

The question then arises as to the extent of power and control which the state acquired over the college by that act and its acceptance, and what authority of the church over it was thereby relinquished. Making the Corvallis College the Agricultural College of the state was not an arbitrary act of sovereignty on the part of the state. The legislature had no power to compel the Corvallis College

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to become such Agricultural College without its consent. It became such by mutual agreement between the two parties, who were capable of entering into a contract, and it included a subject-matter in regard to which they could lawfully contract. Whether said church consented to the arrangement between the state and the Corvallis College is not directly alleged in the complaint. I think, however, it would be inferred therefrom that it did so, as it is alleged therein that, since said college was made the Agricultural College of the state, large contributions of property and money by members of the Methodist Episcopal Church South, and other persons, have been made to the support of it as such Agricultural College; and the acceptance of the act, which must have been given by the trustees appointed by said conference, would authorize such inference in the absence of proof to the contrary. Now, if the power of the state over the college arises out of contract, the extent of the power must necessarily be determined by the terms of the contract.

Viewed in this light, I do not see how the state acquired any interest in or control over the property in question through the arrangement between it and the college, as set out in the complaint; or how the said church could have been deprived of any of its rights in the property held in the name of the college in consequence thereof. There is no stipulation shown or intimated entitling the state to control the property conveyed to the college, nor that it should not be held in trust for the church, as provided in the charter of the college.

The claim of the respondent's counsel that the title to the property was taken in the name of the Corvallis College for the uses and purposes of the State Agricultural College cannot be maintained. It was deeded to the Corvallis College in consideration of four thousand five hundred dollars, and the only clause in the deed which limits

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the use of the property is the following: "And this conveyance is made to the Corvallis College to the end that the premises be used *by said college* as an agricultural farm in connection and for the purpose of the Agricultural College of the state of Oregon. Now, whenever said premises shall cease to be used or occupied for the purposes of said Agricultural College, then the said premises shall vest and become the property of the several persons who have or shall contribute the purchase-money, in the proportions contributed by each person."

This clause created a conditional limitation. The college, at the time the deed was executed, had been designated, as has already been mentioned, the "Agricultural College of the state"; and it is very apparent from the circumstances of the transaction that the founders and patrons of the college, who doubtless were instrumental in procuring for it the distinction referred to, bought the said lands from Roberts, and had the said deed, with the condition therein contained, executed for the benefit of the Corvallis College, and for their own benefit. The condition is in favor of those who contributed the purchase-money; no other person can take advantage of it; and the premises were given to the Corvallis College, subject to the condition to enable it to carry out its compact with the state. It was the latter institution which was to use the premises; it had agreed with the state, in effect, that it would add another branch to its course of instruction, and that its leading object should be "to teach such branches of learning as are related to agriculture and the mechanic arts," and it needed the premises for an agricultural farm.

The deed itself created no trust that I can discover; it did not vest the title to the land in the college, to hold for the use of any other institution or person, although it required the grantee to use it for the purposes mentioned. How a

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trust could have arisen in favor of the Agricultural College of the state, when there was no such institution, at least, that was distinct from the Corvallis College, is beyond my power of comprehension. Counsel for the respondent seem to think that there is a distinct entity known as the "Agricultural College of the state," and that it is essential that there should be such an institution, in order to enable the state to realize the benefit of the provisions of the act of Congress donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts, passed July 2, 1862. A state is not entitled to the benefit of that act except "for the endowment, support, and maintenance of at least one college, where the leading object shall be—without excluding the scientific and classical studies, and including military tactics—to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislature may prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life."

But I do not see that it is necessary for the state to found a college in order to secure such benefit. It appears to me that it would be sufficient, to entitle the state to the benefit of the act, to endow, support, and maintain, so far as the income of the fund will permit, an existing college to carry out the object indicated, and that it would matter not whether it was called the Agricultural College of the state or was known by some other name. The Agricultural College fund is undoubtedly a trust fund in the hands of the state, and if the state were to endow a college out of it, in compliance with the provisions of said act of Congress, it would unquestionably be entitled to exercise visitatorial powers over the college; but it would have no authority to interfere with the charter of the institution:

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The legislature cannot alter the charter of any private corporation.

The old case of *Dartmouth College v. Woodward*, 4 Wheat. 518, settled that question; besides, private corporations, by our constitution, can only be formed under general laws. If the theory of the respondent's counsel is correct, that Roberts and wife conveyed the said land in trust for some one, I am unable to discover who the *cestui que trust* could have been; nor do I think that any trust, as claimed, is indicated in the deed of conveyances.

As I view the matter, there was no such institution as the Agricultural College, except in name. The appellants allege in the complaint that the Corvallis College became the Agricultural College of the state; they probably thought so from the fact that the legislative assembly, by an act approved October 21, 1870, so declared; but it does not appear that any such institution was ever organized, and the legislative assembly has no power by its fiat to transform one corporate institution of that character into another. It cannot create a corporation by direct enactment, except for municipal purposes (Const., art. 2, sec. 2), although it may provide, by a general law, for organization of such a corporation. I apprehend that it will be discovered, upon close inspection, that the "Agricultural College of the state of Oregon" has only an ideal existence. When the Corvallis College was organized into a corporation, the name it assumed, and by which it was to be known; was specified in its articles of incorporation; and the legislature had no power to change it, or to merge the corporation into another organization, either real or imaginary.

This view did not affect the relations between the Corvallis College and the state, nor question the former being such a college as is required by said act of Congress; it merely regards its legal *status*.

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The Corvallis College is an agricultural college; its leading object is to teach that branch of learning which relates to "agriculture and the mechanic arts"; and to distinguish the character of its work from that of other institutions of learning, it may properly be termed the Agricultural College of the state; but that is only its conventional name; its legal name is the one it received at its conception and birth. I cannot see that the declaration of the legislative assembly declaring the Corvallis College the Agricultural College of the state changed the relations existing between the former and the Methodist Episcopal Church South. If the legislature had intended that the property thereafter acquired by the college should be held in trust for the state, and to inaugurate a new *regime* in the management and control of the college, and in the appointment of its trustees, it should have required it, as a condition of the arrangement entered into between it and the state to teach agriculture and the mechanic arts, in compliance with said act of Congress, to so modify its charter as to declare such trust and give the state the authority to appoint such trustees. Instead of pursuing that course, it left the whole matter *in statu quo*. Unless, therefore, the deed from Roberts and wife declared a distinct trust, the one specified in the charter must prevail, and the right on the part of the said conference to appoint the trustees continues.

I am aware that the church has no tangible or real interest in the land; that it cannot divert it from the use specified in the deed, or derive any direct pecuniary benefit from it whatever; nor that its right to appoint trustees to manage and control it is of any immediate advantage; but it is, nevertheless, entitled to exercise such right, and the legislature has no power to deprive it of its authority in that particular. It belongs to that character of rights which courts of equity are required to defend against

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arbitrary encroachments. The trustees of the college had no authority under its charter to convey away the land. Their power over the property of the corporation must be found in its charter, which, in that regard, is their paramount law, and is beyond the reach of any legislative enactment. It is their rule of action so long as it stands, and there is no power to alter it, except that which inherently exists in the corporation itself and its beneficiaries. Nothing but their voluntary act can change it, which could only be effected by filing supplementary articles, adopted by the trustees of the corporation, with the consent of the church for whose benefit and advancement it was originated.

In arriving at this conclusion, I am not consoled by the reflection that the view expressed will promote the best interests of the public. I think it would be far better for the community if the Corvallis College, in its present condition of affairs, were under the exclusive control of the state. But if this court were to hold, under the facts of the case, that the interest of the Methodist Episcopal Church South in that institution, and authority over it, as provided by its charter, were cut off by the legislation referred to, or that the said deed from Roberts and wife created a trust in favor of any other party than the said church, it would, I am constrained to believe, overturn well-settled principles of law, and tend to establish a pernicious and dangerous precedent. If counsel for the respondents are able to show that the conclusions arrived at are erroneous, we trust they will do so in a petition for a rehearing, and we will gladly correct them. According to the view herein expressed, the decree appealed from must be reversed, and the case remanded to the circuit court, with directions to overrule the said demurrer, and for such further proceedings as that court may deem proper.

AFTER REHEARING.

LORD, J.—The main controversy arises out of the construction to be given to that portion of the articles of incorporation as are set out in the complaint. The articles are not set out in full, and as the demurrer confines us only to so much of them as are stated in the complaint, our inquiries must be thereby limited. It is not possible, then, for us to say what effect the articles of incorporation might have, considered as a whole, in determining the question here involved. It may be possible that the omitted articles, considered in connection with those stated, might throw much light upon the objects and purposes of the incorporation, and indicate that they were intended and that the articles in fact do authorize the college to take and hold property as a source of revenue and income to maintain and endow it as a literary institution for educational purposes. By the second article of the articles of incorporation, as set out in the complaint, it is provided as follows:—

“The object of this incorporation is to acquire and hold property in trust for the Methodist Episcopal Church South in the state of Oregon, and to endow, build up, and maintain an institution for educational purposes, and to confer all such honors, distinctions, and degrees as are usual in colleges, to be conducted and carried on under the direction and control of the trustees as aforesaid, and their successors in office, provided that said college shall be a strictly literary institution.”

When incorporated, that the college became a legal entity, and endued with the capacity to hold property in trust for the church, is not disputed; but the inquiry and point of contention is, whether by the articles referred to it could hold property for itself, as distinct from the church, to endow, build up, and maintain the college for educational purposes as a literary institution.

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The claim of the plaintiff is, that all property of whatsoever kind, and however acquired, of which the college is capable of taking, is held in trust for the church, to be applied to the purpose specified, if there be any, under the direction of trustees appointed by it.

In this view, the land donated, although for agricultural purposes, when the title was taken by the college, was held in trust for the church and subject to their direction and control through the trustees, of their appointment for the purposes specified.

But is this the proper construction to be given to the article cited? It not only provides for holding property in trust for the church, but also provides for endowing and building up the college for educational purposes. To "endow" means to make provisions for the support of a corporation or institution by appropriating lands or funds as a source of regular and reliable income. By the word "endow," as used in that article, it would seem to have been intended to endue the college with all the functions and capacities which such word imparts, and that is, usually, to take and receive property or funds in all the various forms in which it may be donated for educational purposes.

In this view, the college was incorporated as much for the specific object of maintaining an institution of learning which should be strictly literary and capable of conferring the usual degrees of honor and distinctions as it was to furnish an entity to hold property in trust for the unincorporated church association.

How could the college be built up and maintained for educational purposes as specified in the article, unless it could take property and funds which it could appropriate through its trustees for that purpose? We all know, as a matter of common knowledge, that institutions of this and like character are usually endowed with the capacity

to take property and do business within the scope of the direct purposes of such institutions, and that they are built up and maintained by tuition fees, and gifts and donations from the living and dying to foster and extend the enlightened projects for which they are organized.

It may be that a mere literal reading of the article would indicate that the corporation was "to hold property in trust for the church and to endow an institution" (the college); that is, that the corporation or college was to endow itself. But this could not be; for it is a thing to be endowed. The word "endow," said the lord chancellor in *Edwards v. Hall*, 6 DeGif. & G. 33, "means giving a benefit to some existing thing. It supposes something to exist either at the time the gift is made or when the endowment is to take place." It will hardly do to suppose that the word was used or intended as used to defeat the sense which its proper meaning imparts, and especially as applied and ordinarily used in connection with such institutions. Yet to such uses must it come to give the article that construction,—a construction inconsistent with the proper signification of the word, and so manifestly impossible in the result reached that the absurdity would seem to render it unworthy of serious consideration. Nor does it give any color to the construction as contended for by the plaintiffs only as it tends to make the corporation do the impossible, and thereby defeat the power of the college in its own right to take and receive gifts and benefits for the purpose of education.

Their contention is, as the corporation could not endow itself, it has no capacity to take property by way of endowment or otherwise, according to this article, and therefore it could only take property in trust for the church. But can this construction be maintained? Is not the construction equally as reasonable and in conformity with an intent that makes the object of the in-

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corporation twofold, viz.: 1. To hold property in trust for the church; and 2. To take property for itself for educational purposes? Can it have been intended that Corvallis College was not capable of taking a gift, or bequest, or legacy, or property, or funds to itself and in its own right to be used as a source of income or revenue "to endow, build up, and maintain an institution for educational purposes"?

How were these objects so distinctly specified to be effected without sources of revenue, derived in the various ways that institutions of this kind are made the recipient of benefits? One of the purposes to be effected, it is admitted, was to endow, build up, and maintain the college for educational purposes; and unless it would do violence to the terms of the article, ought not that construction of it, if reasonable, to be adopted which would carry the power essential to effect that purpose, and thereby make the college capable of taking and holding property for the uses specified, and essential to its existence and prosperity? To do this, we must necessarily give to the article a construction which would include the twofold objects as already stated. In one case the church would have a direct and beneficial interest in the property held in trust for it, while in the other, the college would take the legal title and beneficial interest in the property, and devote it to the educational purposes for which it was organized as a literary institution. As to property of the first character, the trustee of the college could make no disposition of it without the direction and consent of the church. Its interest is direct and substantial, and of such a beneficial character as would entitle it to have a right to any remedy that would frustrate any disposition of it against its will; but as to property with which the college might be endowed, it has no such interest as authorizes it to interfere, direct, or control the management

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of it, except as it might incidentally exert its influence through the individual character of the trustees appointed by it.

For the purposes of the present case, it is sufficient to say that, while the college was thus organized, and for the objects specified, the state proposed that if the college would become an agricultural college,—that is, if it would give and include those instructions in agriculture and mechanics contemplated by the act of Congress,—it would give or endow the college with the benefit of such funds.

The trustees accepted this proposition. And while no legal entity as an agricultural college *eo nomine* was created by the proposition and its acceptance, the college did enlarge the sphere of its instruction so as to include the studies of agriculture and mechanics. In effect, Corvallis College did become, so far as instructions in these branches were concerned, to all intents and purposes an agricultural college. It being the only legal entity, the right of the church to appoint trustees for it still remained.

While this state of facts existed, the deed of Roberts and wife to the land in question was made, and as therein stated, “to the end that the premises be used by said college as an agricultural farm in connection and for the purposes of the Agricultural College of the state of Oregon.” To devote the land to the uses specified in the deed could only be done by conveying the legal title to Corvallis College; for there was no Agricultural College *eo nomine* as an entity to take it; and as Corvallis College had undertaken, in compliance with certain legislation, to give such instructions in agriculture as were taught in agricultural colleges, there was no other way than the mode adopted to carry into effect the purposes to which the land was to be devoted as specified in the deed. Hence, to give what was styled the Agricultural College

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the use and benefit of the farm as proposed and intended necessarily required that Corvallis College should take the legal title to the property for the uses and purposes specified. The college held the legal title, but the real beneficiary was the Agricultural College, or that department of instruction specifically devoted to teaching agriculture; and so long as the land is devoted to the uses specified, who has a right to complain? Or what interest has the church in this property? Manifestly it was not intended that the church should be the beneficiary of the gift, or it would have been so specified in the deed; and as it is not, but distinctly stated "to be used as an agricultural farm in connection and for the purposes of the Agricultural College of the state of Oregon," there does not exist in the church any right or interest in this property. The trustees of the college, appointed by the church, may manage and control the property for the uses specified while the title remains in the college, but no longer; yet this gives the church no interest in the property, or a right of suit in its own behalf. It seems to me that the church has just as much right to claim an interest in the fund appropriated by the state to the use of the college for agricultural purposes as it has to claim an interest in the land in dispute; and the fact that the college did for several years take that fund and apply it to the uses specified indicates that it is endued with the capacity to take property and funds and hold it for other purposes than in trust for the church.

If the view here suggested is fairly deducible from the article as stated, and more consonant with right reason and the true objects of the incorporation, it is conclusive of this case. It cannot be denied, however, but that the subject is susceptible of conflicting inferences, and, from some vagueness of expression, involved in doubt, and, what perhaps is more significant, there is a want of that

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unanimity of opinion in respect to it which is desirable when important rights are to be affected by decisive action. The construction so ably and learnedly pressed upon our attention has once received the approval of this court, and may yet turn out, when all matters can be more fully considered, the better view than the one suggested. Either view doubtless may be susceptible of adverse criticism; and in such case, where, from obscurity of expression, doubt is evolved and diverse conclusions are drawn, when important rights are at stake, it is the part of duty to proceed with caution and deliberation that injustice may be avoided and the right prevail.

It is always better and more satisfactory, if it can be done, to determine matters in litigation upon their merits. Under these circumstances, it seems to us the safer and wiser course to pursue, especially when important facts admitted by the demurrer will be denied and contested, is, to remand the cause for further proceedings, when the particular subjects now considered, taken in connection with others to which it may stand related, may make the true objects of the incorporation more clearly and satisfactorily appear, and thus afford the court an opportunity to determine the rights of the parties in accordance with the justice of the law.

[Filed November 26, 1888.]

ALEXANDER JACKSON, RESPONDENT, v. WILLIAM JACKSON, APPELLANT.

PLEADING — CONSTRUCTION OF UNDER CODE. — The Civil Code of this state requires the allegations of a pleading to be liberally construed, in order to determine its effect, with a view to substantial justice between the parties.

Id. — GROUND OF DEMURRER TO. — A pleading must contain facts sufficient to constitute a cause of action, suit, or defense, but a failure to state them with clearness and precision is not a ground of demurrer; if they are stated in such a vague and ambiguous manner that the precise nature of the charge or defense is not apparent, the remedy of the adverse party is by motion to compel the pleader to make it more definite and certain.

Id. — PRE-EMPTION LAWS — POSSESSION — INJUNCTION. — Where a plaintiff alleged the filing of his declaratory statement, claiming to pre-empt two subdivisions of land under the laws of the United States; that he was a legally qualified pre-emptor under said laws; that he had been in the peaceable and quiet possession thereof, complying with the requirements of said laws in doing all necessary acts of residence and cultivation; that the defendant unlawfully and wrongfully took possession of one of the subdivisions, and prevented and forcibly resisted the plaintiff from taking possession thereof; that the defendant forcibly resists plaintiff from taking possession of the land in order to do the necessary acts of residence and cultivation thereon; and that the defendant was wholly insolvent: *held*, that the facts stated were sufficient to constitute a cause of suit for an injunction to compel the defendant to desist from doing such acts, and to admit the plaintiff into the possession of the land; that the filing of the declaratory statement by the plaintiff entitled him to the possession of the land for the purpose of performing those acts required to be done by the pre-emption law; and that no other person had a right to enter the land or to interfere with the plaintiff's occupancy of it so long as his entry remained uncancelled.

APPEAL from the Circuit Court for the county of Coos.

Hazard & Wilson, for Appellant.

J. W. Hamilton, for Respondent.

THAYER, C. J. — The respondent commenced a suit against the appellant in said circuit court to compel him to admit the respondent into the possession of certain

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premises, situate in said county, and described as the west half of southeast quarter, and northeast quarter of southeast quarter of section 25, township 28 south, range 12 west, and to enjoin the appellant from entering upon the said premises. He alleged in his complaint that he was a legally qualified pre-emptor under the laws of the United States; that on or about the twenty-fifth day of May, 1887, he duly filed his declaratory statement, claiming to pre-empt said premises under the laws of the United States; that said filing was duly made in the United States land-office at Roseburg, Oregon; that for two years previous to said filing he was in the peaceable and quiet possession of said premises, and complying with the requirements of the laws of the United States in doing all necessary acts of residence and cultivation thereon; that inasmuch as there was a question as to whether said premises were subject to pre-emption, or whether they fell within the limits of the Ooos Bay Wagon-road Company's grant of land, a private corporation doing business within the state of Oregon, and duly organized under the laws of the state, he made a contract with the said company for the purchase of said premises, in the event the same should come within its grant, previous to his filing, and by the license and permission of said company, was in possession of said land on the eighth day of February, 1888, at which time the appellant unlawfully and wrongfully took possession of the premises, and had prevented and forcibly resisted him from taking possession thereof; that the appellant had committed and was then committing acts to the irreparable injury of the rights of the respondent, in that the appellant forcibly resisted respondent from taking possession of said premises in order to do the necessary acts of residence and cultivation thereon, and said appellant had injured the stock of respondent on the premises, and

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threatened to kill any of respondent's stock which he might find thereon; that appellant was wholly insolvent, and unable to pay respondent any damages which might be recovered in an action, and that he had no plain, speedy, or adequate remedy at law.

The appellant demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of suit. The circuit court overruled the demurrer, and the appellant having failed to answer over, the decree appealed from was entered against him.

It is claimed by the appellant's counsel on the appeal that a pleading must be construed most strongly against the pleader. He claims also that the ground of the suit is irreparable injury to the respondent, and that, in order to maintain it, the respondent must not only allege it, but must state the facts from which it is inferable. He further claims that the complaint is defective in not stating such facts.

Whatever the rule may heretofore have been in regard to the construction of a pleading, is unimportant. Under the present practice in this state, it is regulated by positive law. Our code, section 84, provides that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." This is, to my mind, a wholesome improvement upon the rule contended for by appellant's counsel, and is in harmony with the general spirit and intent of code practice. A pleading must contain facts sufficient to constitute a cause of action, suit, or defense; but a failure to state them with that clearness and perspicuity required in good pleading is not a ground of demurrer. It is not open to that character of objection, unless it fail to contain some material averment. If the facts necessary to constitute a cause of action, suit, or defense can be obtained by a liberal con-

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struction of the allegations in the pleadings, with a view to substantial justice between the parties, a demurrer to it should not be sustained. When the pleader alleges sufficient facts in such a case, but states them in such a vague and ambiguous manner that the precise nature of the charge or defense is not apparent, the remedy of the adverse party is by motion to compel him to make it more definite and certain.

I have examined the complaint demurred to, and think that it states facts sufficient to entitle the respondent to the relief claimed. The case is one which requires a speedy and summary remedy; otherwise the respondent will necessarily lose the benefit of his pre-emption right to the premises.

The appellant's counsel contends that the complaint does not show the respondent entitled to the possession of the premises; that the claim of license from the wagon-road company had no effect, as it is not shown that said company ever had the right of possession itself, nor that the mere filing of a pre-emption declaratory statement necessarily gives the right to the possession of all the land covered thereby, as any number of persons are allowed to file on the same tract at the same time, leaving the question of the ultimate right to purchase to be decided by the department whenever a contest shall be initiated, or an attempt made by one of the claimants to perfect his entry. Upon this last proposition we are unable to agree with counsel. We are of the opinion that a pre-emptor by filing his declaratory statement acquires a priority of right, and that he is entitled to the possession of the premises for the purposes of performing those acts required to be done by the pre-emption law, and that no other person has a right to enter the land or to interfere with his occupancy thereof so long as his entry remains uncanceled.

Per Curiam.

The facts alleged in the complaint show such an interference on the part of the appellant with the respondent's occupancy of the premises as will necessarily jeopardize his right to perfect his title thereto under the pre-emption law of the United States.

The judgment appealed from will therefore be affirmed.

[Filed November 26, 1888.]

JENNIE E. BAILEY, RESPONDENT, v. CHARLES
BAILEY, APPELLANT.

APPEAL from Jackson County.

Willard Crawford, for Appellant.

H. K. Hanna, for Respondent.

Per CURIAM.—The suit is for a divorce, and the evidence is brief and direct. Under the circumstances we do not deem it necessary to state the evidence upon which our judgment is founded. It is sufficient to say that we think the court below was fully justified by the evidence in dismissing the plaintiffs complaint, and sustaining the defendant's cross-bill, whereupon a decree of divorce was granted. But we think the evidence shows that the father is not only competent to take care of the child, but under the facts of this case, is the proper one to whom the care and custody of the child should be committed.

The decree, therefore, will be modified so as to give to the defendant the care and custody of the child; Bertha May Bailey, and that the mother be allowed to visit the child at all reasonable times, and it is so ordered.

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[Filed December 3, 1888.]

HENRY GERBER, APPELLANT, v. GEORGE F. BAUERLINE ET AL., RESPONDENTS.

SUPPORT OF STEP-CHILD — STEP-FATHER. — The law does not impose upon a step-father the duty of supporting a step-child, nor is he by virtue of such relation entitled to demand its services.

STEP-FATHER — IN LOCO PARENTIS. — If a step-father voluntarily assumes the care and support of a step-child, he stands in *loco parentis* to such child, and the presumption then is that they deal as parent and child, and not as master and servant.

STEP-FATHER — GUARDIAN. — If a step-father never assumed said duty but qualified as the guardian of the step-child, and as such guardian furnished it with necessities and charged for them in his accounts as such guardian, the presumption that he acted or intended to act in *loco parentis* is rebutted.

IMPROVEMENTS OF MINOR'S PROPERTY — CLAIM OF GUARDIAN FOR. — The ordinary rule is, that a guardian will not be allowed for permanent improvements placed by him on a minor's property without authority.

APPEAL from Benton County.

John Burnette and W. S. McFadden, for Appellants.

J. W. Rayburn, and Stott, Waldo, Smith, Stott, & Boise, for Respondents.

STRAHAN, J.—Some years ago John Bauerline died intestate in Benton County, leaving a widow and two minor children, George F. Bauerline and Margeret Bauerline, now Margaret Carter. The present appellant, Henry Gerber, intermarried with the widow, and soon thereafter was appointed and qualified as the guardian of said minors. The guardian filed an inventory of the property of said wards, from which it appeared they owned the following property:—

Personal property.....	\$175
Real property: Lots 1 and 2 in block 8, Dixon's Addition to the city of Corvallis, and fixtures thereon.	1,500
Total.....	\$1,675

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At the time said guardian qualified, George F. was two and a half years old, and Maggie was in her fifth year. It appears that after said guardian qualified as such he clothed, boarded, and in every way cared for said wards until after they attained their majority. About April, 1887, said wards, having attained their majority, filed an application in the county court of Benton County, Oregon, for a citation to said guardian requiring him to file a final account of his proceedings. In obedience to said citation the guardian filed his final account. Objections to the same were duly filed by said wards, and depositions were taken before a referee by each of said parties on the issues raised by said objections, and the denials thereof by the guardian. Upon the final hearing in the county court, that court found that neither party pay to the other anything; that the guardian's accounts be finally settled; that said guardian be discharged from any further duties of his said trust; that his bondsmen be exonerated; and that each party pay half the costs and disbursements.

From this decree the wards appealed to the circuit court, where the case was regularly heard on the transcript and evidence accompanying it. It appears from the record that said guardian never filed but one account until his final account was filed. This account was filed March 21, 1871. By this account he presented a claim to the county court for the maintenance of George F. and Maggie, a part of which was then allowed. The circuit court found in favor of Maggie in the sum of \$354.07, and in favor of George F. in the sum of \$497.07, and decreed accordingly. From this decree the guardian has appealed to this court. Said guardian's account consists of very numerous items of debit and credit. The debit side of the account is made up of the amount of the inventory: Rents received on property until March, 1871, \$610; cash

received on insurance of property burned in 1871, \$983; money received from sale of some brewery fixtures saved from the fire, \$100; amount received from sale made by order of county court of certain lots which had been ad-measured to Mrs. Gerber as dower, and in which said minors owned a remainder, making a total of \$3,818. The credit side of the account consists of numerous credits for money paid for taxes, insurance, improvements of a permanent nature on wards' property, and for the maintenance and support of said wards, amounting in the aggregate to the sum of \$7,875.20. Deducting debits from credits leaves a balance in favor of the guardian of \$4,057.26.

1. I have read and carefully considered the evidence in support of and against the various items of debit and credit, and do not consider that a particular reference to them is necessary to a proper determination of this cause. It was conceded on the argument that if the wards are chargeable in this accounting with what the evidence manifestly shows their maintenance was reasonably worth, from the time of the appointment of the guardian to the filing of the final account, there would be nothing due from said guardian to either of them. Not only so, but the amount of such an allowance would absorb their entire estate.

But counsel for respondents claim that no such allowance can or ought to be made, for the reason that, when Henry Gerber married the mother of these wards, he stood *in loco parentis* to them, and the law will not permit him to make such charge. When Gerber became the step-father of these children, the law did not impose upon him the duty of supporting them or make him liable therefor. Neither did he become entitled to the proceeds of their labor. The law seems to be that if a step-father voluntarily assumes the care and support of a

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step-child, he stands in *loco parentis*, and the presumption then is, that they deal with each other as parent and child, and not as master and servant, and in such case the ordinary rules applicable to parent and child will apply.

But if the facts tend to show that such step-father never voluntarily assumed that duty, but that he qualified as the guardian of such minors, and in that capacity furnished them with necessaries, and charged them for the same in his accounts as such guardian, the presumption that he acted or intended to act in *loco parentis* is rebutted. In such case, no good reason appears to me why the burden of the support of the wards should fall upon the step-father rather than that they should be supported out of their own property, or why such guardian should not be permitted to apply the necessary amounts to their support out of their estate. The lowest estimate that could be made for their support more than absorbs the amount found in their favor by the circuit court.

This view of the subject disposes of the claim of said wards. On the other hand, I do not think their estates should be burdened with charges for improvements, however permanent or meritorious they may be. No doubt the guardian acted in the utmost good faith in making them, but he has had the use of them, and no charge is made against him for rent, or for the use of the real estate while he occupied it. In addition to this, they were placed there without legal authority. Whether there might not a case arise where an allowance for improvements might be made, we do not now decide or consider. It is sufficient for the disposition of this case to hold that no such controlling equities appear in support of this claim. Whatever merit there may be in the claim for improvements is fully met and counterbalanced by other equitable considerations presented by the claims of the

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wards. This conclusion enables them to receive their estate in its improved condition, freed from any claim on account of such improvements.

What has been said leads to the reversal of the decree of the circuit court, and to an affirmance of the decree of the county court, and it is so ordered.

[Filed December 5, 1888.]

STATE OF OREGON EX REL. P. A. DAVIS ET AL.,
RESPONDENTS, v. ADOLPH WOLF ET AL., APPEL-
LANTS.

BALLOT-PAPER — DUTY OF SECRETARY OF STATE. — Section 2507 of Hill's Code has shifted the duty of selecting suitable ballot-paper from the individual voter to the secretary of state.

BALLOT-PAPER — USE OF SURPLUS AT SUCCEEDING ELECTIONS. — Under section 2507, *supra*, a political committee may purchase of the secretary of state "such quantity or amount of paper as may be necessary or convenient," and its use is not limited to a pending election or the one next ensuing. The surplus, if any, may be used at any subsequent election.

TINTED PAPER — SECRETARY OF STATE. — If tinted paper be selected by the secretary of state and furnished for ballot-paper, ballots printed upon it are lawful and must be counted.

APPEAL from Marion County.

J. J. Murphy, N. B. Knight, and H. H. Hewitt, for Respondents.

Shaw & Gregg and Tilmon Ford, for Appellants.

STRAHAN, J. — This action is prosecuted by the state of Oregon upon the relation of P. A. Davis, John Hicks, J. C. Hayes, and E. L. Smith, against Adolph Wolf, M. Fitzgerald, George Sacra, and Archie Welford, to ascertain by what authority the defendants hold and exer-

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cise the office of councilmen of the city of Silverton, in Marion County, Oregon. The city of Silverton was duly incorporated by the legislative assembly in the year 1885.

It is alleged that at the regular election held in said city on the first Monday in May, 1888, the relators, being in every way qualified, were candidates at said election for the office of councilmen, and that they and one Ai Coolidge received the greatest number of votes for said office of councilmen, and were duly elected; that they accepted said office, and have been ever since said election and now are rightfully entitled to hold, use, and exercise said office of councilmen in said corporation; but that notwithstanding the election of said relators, the defendants, Adolph Wolf, M. Fitzgerald, George Sacra, and Archie Wolford, on the eleventh day of May, 1888, and from hence hitherto, without any legal election, appointment, or authority whatever, have held, used, and exercised, and still do hold, use, and exercise, the office of councilmen of said city of Silverton, and claim to use and exercise the same, and to have and enjoy all the rights and privileges to the said office appertaining, which office and privileges the said defendants for all the time aforesaid have usurped, intruded into, and unlawfully hold and exercise, and still do usurp, intrude into, and unlawfully hold and exercise, to the great damage and prejudice of the relators.

The complaint prays judgment that the defendants are not entitled to the said office of councilmen, and that they be ousted therefrom, and further, that the relators are entitled to said office, and to assume the execution of the duties thereof, upon taking the oath prescribed by law, and that they be placed in possession of same, upon being qualified, and for costs.

The answer denies the material allegations of the complaint, and then contains the following affirmative matter: "And for a further and separate answer to said complaint,

the said defendants allege that they and one Ai Coolidge are, and for all the times mentioned in the plaintiff's complaint have been, the duly elected and qualified and acting councilmen of the said city of Silverton, mentioned in plaintiff's complaint, and that said defendants and said Coolidge are lawfully entitled to have, hold, use, and exercise the said office, and have been duly elected and qualified thereto, as by the law mentioned in plaintiffs' complaint provided. The plaintiffs' reply denied the new matter in the answer. By consent of parties, the case was tried by the court, and the following facts and conclusions of law were duly filed:—

1. That the city of Silverton is a municipal corporation situated within the county of Marion and state of Oregon.

2. That on the first Monday in May, 1888, an election was duly held under the charter of said city by the electors thereof, for the election of five councilmen and other officers of said city for the term of one year.

3. That at said election, as shown by the returns of the judges of the election, the relators P. A. Davis received 38 votes, John Hicks received 38 votes, J. C. Hayes received 37 votes, and E. L. Smith received 37 votes for councilmen; that the defendants Adolph Wolf received 38 votes, M. Fitzgerald received 36 votes, George Sacra received 38 votes, and Archie Wolford received 38 votes.

4. That at said election one J. W. Hicks offered to vote by properly delivering his ballot on which was the names of each of the relators, to the judges of election; that his vote was challenged on the ground that he had paid no tax. And the court here finds that said J. W. Hicks had not paid any county or state tax for more than two years prior to the said first day of May, 1888, or other tax, except what he had within less than one year prior to said election paid to the proper authorities of said city a license taxed against him by said city for keeping a boarding-

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house within said city, which license tax was required to be paid to said city by an ordinance thereof.

5. That at said election one O. G. Sparks offered to vote by properly delivering his ballot, on which was the names of each of the relators, to the judges of election; that his vote was challenged on the ground that he had paid no tax. And the court here finds that said O. G. Sparks had not paid any county, state, or other tax for more than two years prior to said election, except that he had within less than one year prior to said election paid to the proper authorities of said city of Silverton a license taxed against him by said city, under an ordinance thereof, for carrying on, in said city, the business of making photographs.

6. That at said election one William Whitlock offered to vote by properly delivering his ballot, on which was the names of each of the relators, to the judges of said election; that his vote was challenged on the ground that he had not been a resident of said city for — prior to said election. And the court here finds that said Whitlock commenced to reside in said city about September, 1887, and continued to reside and was a householder therein until about the 20th of December, 1887, when he left said city with his family and went to California, with the intent to benefit the health of his wife, and return to said city unless he found something better in California; that he made no permanent settlement or home in California, and returned to Silverton about the 15th of April, 1888, with his family, and has resided there ever since; that when he left for California, he left most of his property and household effects at Silverton.

7. That prior to said election the said city of Silverton had never levied any taxes to support the government thereof, except licenses.

8. That at said election there were two regular tickets voted. One was called and known as the citizens' ticket,

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and the other as the prohibition ticket; that the citizens' ticket was printed on plain white paper, which had been procured as ballot-paper from the secretary of state but a few days before the election, and the defendants were regular candidates on the citizens' ticket.

9. That the prohibition ticket was printed on tinted paper that could be distinguished from white paper, which tinted paper was procured as ballot-paper from the secretary of state about one year before said election, and is the same kind of paper furnished by the secretary of state as ballot-paper, and was used by all parties at the general election of 1886 throughout the state, and was also used by all parties at the election of said city in May, 1887, and the relators were candidates on the prohibition ticket.

9 a. That at the time said tickets were prepared and printed, the parties on said tickets supposed they were being printed on legal ballot-paper, and so considered up to the time of said election, on the first Monday of May, 1888.

10. That after the voting had commenced there was some talking at the polls about the legality of the vote on the tinted paper, but that the voters who voted the tickets on the tinted paper thought they were voting legal ballots.

11. That the names of J. W. Hicks, O. G. Sparks, and Whitlock were recorded at the election among the names of voters, but their ballots were not put in the ballot-box and counted, but were returned to the board of councilmen of said city in a separate envelope, and two of them were identified, to wit, the ballots of J. W. Hicks and Whitlock. The ballot of O. G. Sparks being lost, its contents were proved.

As conclusions of law, the court finds:—

1. That the ballots on the plain white paper called the

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citizens' ticket were legal, and the ballots printed on the tinted paper, and called the prohibition ticket, were also legal.

2. That J. W. Hicks, O. G. Sparks, and William Whitlock were legal voters, and that their votes should have been counted for each of the relators.

3. That the relators, P. A. Davis, John Hicks, J. C. Hayes, and E. L. Smith, were each of them duly elected councilmen of the city of Silverton at said election, on the first Monday of May, 1888.

4. That the defendants, Adolph Wolf, M. Fitzgerald, George Sacra, and Archie Wolford, are each unlawfully holding the office of councilman of said city.

Judgment of ouster was accordingly entered against the defendants, and also a judgment permitting the relators to assume the duties of said office, upon taking the oath prescribed by law. From this judgment the defendants have appealed to this court. Numerous errors are assigned in the notice of appeal, but we will only notice such as are presented on the arguments by the appellants, and all others must be deemed waived or abandoned.

1. The legality of all of the ballots cast for the relators is contested on two grounds: 1. Because they were printed on tinted paper; and 2. Because they were not printed on paper procured from the secretary of state for the purpose of being used at *said election of May, 1888*.

These two objections, though depending on different statutes, are so closely allied, that they will be considered together. The ballot system of voting was introduced in this state by an act of the legislative assembly passed in 1872. (Acts 1872, p. 39.) One of the provisions in that act is section 2533, Hill's Code, and is as follows: "All ballots used at any election in this state shall be written or printed on plain white paper, without any mark or designation being placed thereon whereby the same may be known or designated."

This section was before this court in *State ex rel. Mahoney v. McKinnon*, 8 Or. 494. In that case it appeared that one ballot written on colored *paper* was received and placed in the ballot-box, and one of the questions involved was whether this ballot could be counted. After quoting the above provision, the court say: "The voter in this instance is conclusively presumed to have had knowledge of this requirement, and to have had it in his power to comply with it by using a proper ballot. It was a matter entirely under his own control, and if he chose to disregard the law, he cannot complain if the consequence was that his vote was lost."

Whether this court as now constituted would hold this statute to be mandatory, and not directory, and thus affirm this construction, it is not now necessary to consider, for the reason that the enactment of a subsequent statute on the same subject, presently to be referred to, has shifted the duty from the voter to the secretary of state to provide suitable ballot-paper.

But, aside from the effect of the latter statute, I would be loth to hold that a ballot innocently printed on *tinted* paper and used would be for that reason illegal. A slight coloring or tincture distinct from the ground or principal color makes the paper *tinted*. To make paper *tinted*, then the coloring or tincture distinct from the principal color must be *slight*. It would be a harsh construction of this statute to disfranchise one half of the voters of the city of Silverton for a *slight* departure from the letter of this statute, when no design to evade the law or fraudulent purpose is made to appear. But the statute of February 28, 1885, section 85, relieved the voter of the duty of selecting ballot-paper, and imposed it upon the secretary of state. That provision is found in Hill's Code, section 2507, and is as follows: "At every general, special, or municipal election hereafter held in this state

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in pursuance of law, each elector shall in full view deliver to the chairman of the judges of election a single ballot or piece of paper, on which shall be written or printed the names of the persons voted for, with proper designation of the office which he or they may be intended to fill. No ballot shall bear upon the outside thereof any impression, device, or color, or thing designed to distinguish such ballot from other legal ballots, or whereby the same may be known or designated. No ticket must be used at any election, or circulated at the day of election, unless it is written or printed on paper furnished by the secretary of state for the purpose; and it is hereby made the duty of the secretary of state to procure and furnish, on application and payment to him of the actual cost thereof, with ten per centum thereof added, which percentage shall be his compensation, to the state central committee, county committee, or other managing committee of any political party or organization in this state, such quantity or amount of paper as may be necessary or convenient."

It appears from the ninth finding of fact that the prohibition ticket was printed on paper procured from the secretary of state about one year prior to this election, to be used as ballot-paper, and that all parties then used it. This section transfers from the voter to the secretary of state the duty of selecting suitable ballot-paper, and every voter has the right to assume that that officer has discharged his duty properly. If paper be used by the voter as ballot-paper that was furnished by the secretary of state for that purpose, such voter ought not to be disenfranchised, although such paper should appear not to be "plain white paper," but *tinted*. It is the paper selected by the officer appointed by law to make the selection, and if he should err in judgment or innocently make a mistake as to the color, I cannot see why the voter's rights should be denied him. But it was argued by ap-

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pellant's counsel that to make this law effectual, and to accomplish the purpose of the legislature, it must be so construed that a committee wishing to procure ballot-paper must do so immediately preceding each election, and that if a surplus be left over, it could not be used at the next succeeding election. There might be force in this suggestion if it were addressed to the law-making power, but we cannot adopt it. That would require legislative power. Under this statute as it stands, the political committee may purchase of the secretary of the state "such quantity or amount of paper as may be necessary or convenient," and its use is not limited to a pending election. There is nothing in the statute prohibiting the use of any surplus at the next succeeding or any subsequent election. The objections to the legality of the ballots cast for the relators cannot therefore be sustained on either of the grounds taken at the argument.

2. Some attempt was made by counsel for appellants to criticise the finding of fact as insufficient to justify the conclusions of law. It is claimed that the court did not find when the returns of the election were made to the city council, or that the council ever refused to canvass said returns, or that they ever had an opportunity to do so.

To these objections it may be replied that the findings of fact by the court are more minute than the allegations of fact in the pleadings on either side. It may be true that the ultimate facts upon which right depends ought to have been more particularly stated in the complaint; and so ought the defendant's title to the office have been more fully alleged in the answer. The new matter in the answer is nothing more than legal conclusions dependent upon facts which the pleader has not seen proper to disclose. With such a pleading a party cannot be heard to say that the court's findings are not sufficiently specific.

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Being satisfied that the court reached the proper conclusions as to the law, the judgment appealed from must be affirmed.

ON PETITION FOR REHEARING.

[Filed January 19, 1889.]

STRAHAN, J.—Appellants' counsel have filed a petition for a rehearing, in which they insist with much apparent confidence that our former opinion is erroneous. They think if we would supply a supposed ellipsis by inserting the word "any" in connection with the word "election" in section 2507, the construction which they insist upon would follow. We do not attempt to determine whether that would be so or not. To do what counsel insist we ought would be to violate the letter of section 694, upon which they rely by "inserting what has been omitted." It would also violate established canons of construction. (Sedgwick on Statutory and Constitutional Law, 245, 246.)

After saying in effect that *the thought which the statute expresses* is to be sought for, the author proceeds: "If thus regarded, the words embody a definite meaning which involves no absurdity and no contradiction between the different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such case there is no room for construction. That which the words declare, is the meaning of the instrument. "It is only where the statute is ambiguous in its terms that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law-maker. In the statute before us the language admits of but one construction. No doubt can arise as to its meaning. It must therefore be its own interpreter." (*Bidwell v. Whitaker*, 1 Mich. 469.)

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There is no ambiguity or uncertainty in the language used in the act before us. The sense is complete.

The effect of appellants' contention is, that we ought by some kind of construction to supply language to carry into effect what is assumed to have been the intention of the legislature, and this we hold is beyond the power of the court. The elective franchise is a sacred political right, which the law seeks to guard and protect, and not to destroy.

All laws for the government of elections were designed to enable the elector to signify his will by his ballot, and to give that will proper force and efficacy. Our institutions rest upon the fundamental idea of a free ballot, and it would never be safe to say that the means designed by law to secure the right should be used as the most effective weapon for its destruction.

In passing upon the questions submitted in this case, the court has not felt justified in adopting any narrow or merely technical rule. The right involved is too important to be dealt with in that spirit. The voters all used paper furnished by the secretary of state for that purpose, and were therefore within the letter of the statute. They were qualified electors, and no fraud is alleged or shown.

The court is asked to disfranchise them on the sole ground that the paper was tinted, and had been furnished by the secretary of state one year prior to this election, and this was a remnant left over. There was enough to answer the purposes of the second election, and we are unable to find any law prohibiting its use.

We apply section 694 of the code to this case, and simply ascertain and declare what is, in terms or in substance, contained in the statute, and decline to insert what has been omitted, or to omit what has been inserted. It belongs to the legislature to do that.

All the matters presented by the petition for a rehear-

 Points decided.

ing were fully considered when the case was before us; and while it is possible we may have erred, we gave the case an attentive examination, and see no cause to change the conclusions already announced. A rehearing must therefore be denied.

[Filed December 14, 1888.]

GEORGE W. BELT, DISTRICT ATTORNEY, RESPONDENT,
v. W. W. SPAULDING AND CLEVELAND ROCK-
WELL, APPELLANTS.

CRIMINAL LAW — UNDERTAKING OF BAIL — DESCRIPTION OF OFFENSE CHARGED.

— An undertaking of bail taken before a magistrate upon a criminal examination must state briefly the nature of the crime charged, or it will be invalid.

BAIL — UNDERTAKING — DESCRIPTION OF THE OFFENSE CHARGED. — An undertaking which describes the offense which the defendant must appear and answer as abortion fails to describe any offense defined or made punishable by the law of this state.

BRIEF STATEMENT OF CRIME CHARGED — WHAT SUFFICIENT. — If the crime charged be one that has a technical name, as arson, murder, burglary, rape, larceny, and the like, it will be sufficient to indicate the charge by such general name; if not, enough must be stated in the undertaking to describe briefly some crime made punishable by the laws of this state.

UNDERTAKING MUST BE FILED WITH CLERK OF THE COURT WHERE DEFENDANT REQUIRED TO APPEAR. — Section 1476, Hill's Code, makes it the duty of the magistrate taking bail to file the same with the proper clerk forthwith upon the close of the examination.

FAILURE TO FILE UNDERTAKING — EFFECT OF. — Until such undertaking be filed with the clerk of the proper court, no judgment of forfeiture can be given or rendered by such court.

APPEAL from Multnomah County.

H. H. Hewitt, District Attorney, and R. & E. B. Williams,
for Respondent.

Moreland & Masters and George H. Burnett, for Appel-
lants.

STRAHAN, J.—This action is brought by George W. Belt, district attorney of the third judicial district, to recover two thousand dollars, alleged to be due from the defendants as bail for one G. H. Davis.

It appears from the court's findings that on the eighteenth day of June, 1887, one William Yergen charged one Dr. Davis, in effect, with the crime of manslaughter by assaulting one Lizzie Yergen, in Marion County, Oregon, on the seventh day of June, 1887, who was then pregnant with a quick child, and by the use of instruments destroying said child, the same not being necessary to preserve the life of said Lizzie Yergen, the mother of said child. Upon this information, said justice issued a warrant, and G. H. Davis was arrested and brought before him, and waived an examination of said charge, and submitted to the order of said court in said matter, whereupon said justice made an order that said Davis be held to answer the charge of manslaughter by abortion, and that he be admitted to bail in the sum of two thousand dollars for his appearance at the October term, 1887, of the circuit court of Marion County, and thereupon said Davis deposited with said justice in lieu of bail the sum of two thousand dollars, and was discharged from custody on the fifth day of July, 1887. Afterwards, on the twenty-third day of September, 1887, the undertaking sued on was attempted to be substituted in place and lieu of said two thousand dollars. The undertaking is as follows:—

“Justice's Court for the precinct of East Salem.

“State of Oregon,)
County of Marion.} ss.

“An order having been made on the third day of July, 1887, by J. O'Donald, justice of the peace in and for East Salem precinct, in Marion County, Oregon, that G. H. Davis be held to answer upon a charge of abortion, upon which he has been duly admitted to bail in the sum of

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two thousand dollars, we, W. W. Spaulding, of Portland, Oregon, by occupation a wholesale meat dealer, and Cleveland Rockwell, of Portland, Oregon, by occupation a capitalist, hereby undertake that the above-named G. H. Davis shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and precepts of the court, and if convicted, shall appear for judgment, and render himself in the execution thereof, or if he fail to perform either of those conditions, that we will pay to the state of Oregon the sum of two thousand dollars.

“Dated this twenty-second day of September, 1887.

(Signed)

“W. W. SPAULDING,

“CLEVELAND ROCKWELL.

“Taken and acknowledged before me the day and year above written.

“Justice of the Peace.”

Then follow the affidavits of Spaulding and Rockwell, showing that they possessed the requisite qualifications to become sureties, and that each of them was worth over two thousand dollars, exclusive of property exempt from execution, and over and above all just debts and liabilities. There is no mark on the undertaking to indicate that it was at any time filed with the county clerk. At the October term, 1887, of the circuit court of the state, for Marion County, the grand jury returned an indictment, indorsed “a true bill,” charging G. H. Davis with the crime of manslaughter, by producing abortion. The indictment sets out with the necessary particularity the same offense charged in the information filed with Justice O’Donald.

It also appears from the findings in the case that at the October term, 1887, of said circuit court, said G. H. Davis was duly called to answer said indictment, but failed and neglected to appear in said court for arraignment, or for

any purpose whatsoever, and that the present defendants, sureties for said Davis, failed to produce said Davis in court, or to furnish any excuse for Davis's absence or his failure to appear. Said court thereupon directed that the fact of said failure of said Davis to appear to answer said indictment be entered in the journal, and said undertaking be deemed forfeited. The venue was changed to Multnomah County, where the cause was tried by the court, without the intervention of a jury, which trial resulted in a finding and judgment for the plaintiff for the sum of two thousand dollars, and for costs and disbursements, from which judgment the defendants have appealed to this court.

The notice of appeal contains numerous assignments of error. Such of them only will be noticed as are necessary to the determination of the case.

1. It is claimed by the appellants that the undertaking sued on does not describe any crime known to the laws of this state, and that it is therefore invalid and insufficient. This objection suggests two questions: 1. Whether an undertaking in a criminal proceeding which fails to describe an offense punishable by the laws of this state is for that reason invalid; and 2. Whether the undertaking in question describes such offense. These questions will be considered in the order stated.

1. In an early case in this state (*Williams v. Shelby*, 2 Or. 145), this court laid down what I conceive to be the true rule applicable to this class of undertakings. It is there said: "The circuit court held that although there was no statute then in existence authorizing the taking of this bond by the justice, yet it might be sustained and held valid as a common-law undertaking; that the discharge of the principal for the time being was a sufficient consideration to sustain the promise and agreement entered into. This holding, we think, cannot be sustained

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by the authorities; in fact, none have been produced to that effect. Authority has been cited to this effect, that another class of bonds might well be sustained from their form and structure, without the aid of statute, such as injunction bonds, replevin bonds, bail bonds in civil cases, forthcoming bonds, appeal bonds, and all such as are made payable to the beneficiary or interested party. Such have been held valid at common law, without resorting to the statute to give them effect; but it is held otherwise in criminal cases."

There is no other rule by which the question under consideration can be solved, except by reference to the adjudged cases; but before proceeding to an examination of the cases, it may be proper to refer to section 1470, Hill's Code, which prescribes the form of the undertaking to be given in criminal prosecutions before indictment, and requires that the *nature of the crime charged* be briefly stated in such undertaking.

This action evidently requires that there should be a crime charged, and that its *nature*—the sum of qualities and attributes which make a thing what it is, as distinct from others, or the kind, sort, character, or species—be briefly stated in the undertaking. This statutory requirement, then, it is believed, introduced no new rule, but left the law just as it was before its enactment. In other words, it is declaratory of the common law on that subject.

A brief reference to the authorities will better illustrate the rule. In *People v. Sloper*, 1 Idaho, 158, it is thus stated: "The undertaking need not set out the offense charged with the same technical particularity required in an indictment, but it will be sufficient if the offense be substantially described, that it may appear what charge the accused is held to answer. If, however, the recognizance undertake to recite a specific charge, as in

the present case, a charge must be recited for which an indictment will lie, otherwise the recognizance will be void."

So in *Nicholson v. Georgia*, 2 Ga. 363, it was held that a recognizance must stand or fall by itself, and if not good on its face by failing to specify the offense for which the accused was arrested, and bound to appear and answer, parol evidence is inadmissible to supply the defect.

So, also, in *Dailey v. State*, 4 Tex. 417, the offense with which the defendant stood charged, according to the undertaking, was, "having in his possession stolen goods," and the court said: "We know of no law making this an indictable offense, or which authorizes the taking of a recognizance to answer this charge. The mere fact of having in his possession stolen goods is not a crime. The possession may be lawful, and would not be criminal unless accompanied with a criminal *scienter*, or felonious intent." The possession of stolen goods may be evidence to support a charge of larceny, but it does not of itself constitute that crime."

So in *Cotton v. State*, 7 Tex. 548, the court says: "To answer a charge of felony would be sufficiently explicit, because for every felony an indictment will lie. But an indictment will lie on every charge of 'gaming.' The same may be said of a charge of 'playing at a game of cards.' The words do not describe an indictable offense. There must be something more than simply 'playing a game of cards' to subject the party to a criminal prosecution. It does not therefore appear that the principal in the recognizance was bound to answer to an offense for which a criminal prosecution could be maintained. The recognizance consequently was not obligatory upon him or his sureties, and no valid judgment upon it could be rendered."

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To the like effect is *Tousey v. State*, 8 Tex. 174; *Commonwealth v. West*, 1 Dana, 165; *West v. Commonwealth*, 3 J. J. Marsh. 641; *Simpson v. Commonwealth*, 1 Dana, 523; *State v. Ridgley*, 10 La. Ann. 302; *State v. Forno*, 14 La. Ann. 450; *Gray v. State*, 43 Ala. 41; *People v. Kane*, 4 Denio, 530; *People v. Rundle*, 2 Hill, 506; *State v. Gibson*, 23 La. Ann. 698; *Commonwealth v. Downey*, 9 Mass. 520; *Commonwealth v. Loveridge*, 11 Mass. 336; *Commonwealth v. Diggett*, 16 Mass. 446; *Goodwin v. Governor*, 1 Stew. & P. 465.

The researches of the learned district attorney has brought to our attention numerous cases which have some degree of relevancy to the question under consideration, but a careful examination of them fails to convince me that, uninfluenced by the peculiar circumstances or condition of the particular case, they declare any other or different rule from the one announced by the authorities already cited.

The rule commended by these authorities is reasonable. It imposes no inconvenience upon the public, and is at once notice to the bail of the gravity and importance of their undertaking. The undertaking, I think, must on its face indicate briefly the nature of the offense charged, and unless it does so, it is not binding.

I do not mean by this that it should be stated with the technical particularity necessary in an indictment. Far from it. If the crime charged be one that has a technical name, as murder, arson, burglary, rape, larceny, and the like, it will be sufficient to indicate the charge by such general name; if not, enough must be stated *in the undertaking* to point out clearly and unmistakably that a particular crime known to the law of this state is charged.

2. Does the undertaking in question do this? Crimes at common law are unknown in this state. No act is punishable here unless it be made so by some statute,

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and it must be conceded that we have no statute declaring "abortion" to be a crime or making it punishable. The offense for which G. H. Davis was prosecuted is defined by section 1721 of Hill's Code. That section is as follows:—

"If any person shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instruments or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter."

It will be observed the word "abortion" does not occur in the section, and there is no statute defining or punishing it is a crime. The term itself does not import a crime. It simply means, according to Webster, the act of miscarrying, the expulsion of an immature product of conception, miscarriage; the immature product of an untimely birth. And an eminent law writer defines it to be the act of bringing forth what is yet imperfect; and particularly the delivery or expulsion of the human *fœtus* prematurely, or before it is yet capable of sustaining life; also the thing prematurely brought forth, or produced of an untimely process. (1 Abbott's Law Dic. 3, title Abortion.) In *Abrams v. Foster*, 3 Iowa, 274, the question whether a charge of abortion imputed a crime underwent a very thorough and learned examination. It was an action for slander for words spoken by the defendant's wife, whereby the plaintiff was charged with causing or procuring an abortion, and the question was, whether the charge imputed a crime, and the words spoken actionable *per se*. The court, after a very careful and exhaustive examination of the authorities, held that the charge did not impute a crime, and that the words were not actionable.

3. Another objection urged by the appellants upon the trial was, that the undertaking was invalid, and the adjudged forfeiture was ineffectual, for the reason that the undertaking had not been returned to the circuit court.

Section 1476, Hill's Code, requires the court or magistrate, when the examination is closed, to indorse on the undertaking an order, either allowing or disallowing the bail, and must forthwith cause the same, with the affidavits and examination of sureties, and the order of admission to bail, to be filed with the clerk of the court at which the defendant is bound to appear, or where the action is pending, or the judgment appealed from is given, as the case may be.

A statute similar to the one just referred to was in force in the state of Iowa; and in a somewhat analogous case which arose under it, the supreme court of that state said: "The cases cited by counsel of appellant sustain the position that such bond should be on file before such forfeiture could be declared, and particularly the case of *Bacon v. People*, 14 Ill. 312.

Although this was a proceeding by *scire facias*, we think the principle is equally applicable in actions of debt on the bond. Says Treat, C. J.: "It does not appear that the recognizance was returned to the circuit court before the judgment of forfeiture was pronounced. The statute requires every recognizance taken out of court to be certified and returned into the circuit court. It is not a matter of record until this is done. It must become such before a forfeiture can be entered, or a *scire facias* can be issued upon it. The court may compel the officer by attachment to return it, but it must become a record of the court before a forfeiture can be declared." (*State v. Klingman*, 14 Iowa, 404.)

And to the same effect are the following: *Bridge v. Ford*, 7 Mass. 210; *Libbey v. Main*, 7 Me. 344; *Darling v. Hub-*

bell, 9 Conn. 627; *State v. Smith*, 8 La. Ann. 471; *Elliott v. Dudley*, 8 Mich. 62; *People v. Shaver*, 4 Park. Cr. 45; *Tarbel v. Gray*, 4 Gray, 444; *County of Mendocino v. Lamar*, 30 Cal. 627; *State v. Smith*, 2 Me. 62.

A copy of the undertaking is attached to the complaint, but there are no file-marks on it indicating its filing in the circuit court. If it had been actually filed in the circuit, the neglect of the clerk to place his file-mark on it would not prejudice the state.

The fact of filing might be alleged and proven. (*State v. Klingman*, *supra*.) But this was not done, nor is there any allegation or finding that said undertaking was ever returned to the circuit court. Plainly the circuit court could not declare a forfeiture of the undertaking until it had been returned to and had become a record of that court. In the absence of such undertaking, it could have no jurisdiction to declare a forfeiture.

4. Several other questions were discussed upon the trial, but it is unnecessary to pursue the inquiry. What has been said is enough to show that the judgment rendered cannot be sustained. This conclusion has been reached with reluctance. There is nothing in the attitude of the defendants to induce the court to favor their defense, aside from the strict letter of the law. They appear to be volunteers to aid a person who stands indicted for a most outrageous crime, and a little attention to the requirements of the law on the part of the officers would have fixed the liability of such defendants so that it could not be questioned. But the court cannot, by distorting the law or forcing it beyond its plain import, supply such defects and omissions.

LORD, J., concurs in the result. Let the judgment be reversed.

Points decided.

[Filed December 19, 1888.]

B. W. HUSTON ET AL., APPELLANTS, v. WILLIAM BYBEE, RESPONDENT.

ADVERSE POSSESSION MUST BE HOSTILE TO OTHER USE. — An adverse, exclusive, and uninterrupted use and enjoyment by one person, and those under whom he claims, of all the water of a creek taken therefrom by means of a ditch, and conveyed to certain mining grounds for mining purposes, for twelve years, or for any period beyond that of the statute of limitations prescribing the time in which entry shall be made upon real property, will bar the owner of the land through which the creek runs of his riparian rights; but where the ditch was constructed, by means of which the water was originally appropriated, under a license granted by the owner of the land, in which he reserved the right to use the water a part of each year for his own purposes, such adverse use by grantees from the original appropriator cannot be established, unless it is shown that the use of the water by them has been in hostility to the use of it by the owner of the land under such reservation.

ID. — The users of the water, in such case, must show that their use of it was in defiance of any right upon the part of the owner to use it for any purpose; that they totally ignored his right to use it at all, and that he acquiesced therein.

FORFEITURE — VIOLATION OF CONDITION ON WHICH FORFEITURE CLAIMED — MUST BE ASSERTED ACTIVELY. — To authorize a person to claim a forfeiture of valuable property rights on account of the violation of a condition upon which they are granted, he must proceed to enforce it at once. He cannot remain passive for a long time after acts have transpired upon which others have relied in matters of importance to them, and then insist upon the forfeiture in consequence thereof.

RUNNING WATER — USE OF FOR IRRIGATING LAND, ETC. — AFTER USE — CONTRACT CONSTRUED. — Where a certain stream of water ran across the land of B., which he was accustomed to use for the purposes of irrigation, for watering his stock, and for domestic use, and which was valuable and necessary for such uses, and he was applied to by one S. for permission to dig a ditch across his land, in order to conduct the water of the stream to certain mining grounds below, upon which S. was engaged in mining, and B. granted the permission upon the promise of S. that the former should have the exclusive use of the water flowing through the ditch at any point on said lands where he might desire to turn it for irrigating purposes during the spring and summer months, and that S. would not sell or dispose of the ditch and water right to any one else, but that they would revert and become the property of B.: *held*, that by a fair construction of the arrangement between B. and S., in view of the circumstances of the transaction, the former was to have the use of the water whenever required,

17	140
27	19

17	140
35	281

17	140
36	86

17	140
37	586

17	140
39	107

17	140
41	217

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for the use of his premises for the purposes mentioned, and the latter was to have the use of it at all other times for the purpose of working his mining ground.

Id. — *Held, further*, that S. having subsequently sold his mining ground and interest in the ditch, and H. having, by mesme conveyances from S., succeeded to the same, and he and his grantors having used the water conveyed through said ditch for the purpose of operating in the said mining ground with the knowledge and acquiescence of B., that the latter was not entitled to claim a forfeiture of the said ditch and water right on account of the said sale by S.; that B.'s acquiescence in the sales and transfers of the ditch and water right must be deemed a waiver of the condition that S. would not sell them.

Id. — *Held, also*, that the use by H. and his grantors of the ditch and water to operate the mine, although it extended beyond the period of the statute of limitations, would not constitute such an adverse possession against B. as would bar his right to the use of the water, under the reservation in the license to S. to construct the ditch, unless H. and his grantors had wholly excluded B. from the exercise of such right during such period; and that evidence of B. having used the ditch and water a portion of each year during the whole time referred to, for irrigating his land, and for the other purposes mentioned, disproved any such exclusive use thereof as suggested, or any use inconsistent with said license and reservation.

Id. — *Held, too*, that B. and H., and those holding under H., had coexisting rights in the ditch and water; that B. had the preference during the season when the condition of his premises were such as to require the use of the water for the purposes mentioned, but that he had no right to waste it at any time, or to use it extravagantly or imprudently; that H. had the full and free right to use it at all other times, and that each was required to respect the rights and interests of the other regarding the matter, in every particular.

APPEAL from the Circuit Court for the county of Jackson.

J. R. Neil, H. K. Hanna, and E. De Peatt, for Appellants.

P. P. Prim and H. Kelly, for Respondents.

THAYER, C. J. — This appeal is from a decree rendered in a suit brought by the appellants against the respondent, to enjoin him from diverting water from what is now known as Walker Creek, — formerly Phillips's Creek, — in the county of Jackson.

• The appellants alleged that they were owners and in the possession of certain mining claims which they had

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been working during the mining seasons since 1876, and that in so doing they had necessarily required and used all the water of said creek; that they and their grantors, about the year 1865, dug and constructed a ditch in said county, known as the "Willow Springs Mining Ditch," and thereby appropriated all the water of said creek at a point above the residence of the respondent, and running thence in a northerly direction along the foothills above Willow Springs to what is known as Hite's Gulch, thence to their said mining ground, and each and every year had, by means of said ditch, conveyed all the water of the creek and said gulch, and the other gulches running into said ditch, to their said mining claims, and used the same for mining purposes thereon, and by so doing had acquired a prior right over respondent to the use and enjoyment of said water; that for more than twelve years, appellants and their grantors had been in the adverse, exclusive, and uninterrupted use and enjoyment of all of said water for mining their said claims, with the knowledge of said respondent; that on the first day of April, 1887, while appellants were in the possession and use of the said water as mentioned, the respondent wrongfully and maliciously diverted it from said ditch, thereby depriving appellants of its use and enjoyment, and still continued to do so, and refused to desist therefrom, to the great and irreparable injury of the appellants.

The respondent denied all the material allegations of the complaint except as admitted in his further and separate answers thereto, and alleged in said further and separate answers:—

1. That at the time said ditch was constructed and the water of said creek appropriated and used through the same, and for a long time prior thereto, the respondent was the owner in fee of a large tract of land, consisting of agricultural, meadow, and pasture lands, on which there were

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valuable improvements, and upon which the respondent reared and kept a great many head of horses, cattle, sheep, and hogs; that the water of said creek flowed through said lands of respondent, near his residence thereon, in a natural channel, at the time the ditch was constructed and the water appropriated, and had done so for a long time prior thereto, and was at the time of its appropriation through said ditch, and had been for a long time prior thereto, appropriated and used by the respondent for irrigating his crops grown upon said lands, watering his stock, and for domestic purposes about his house, and was valuable to him and necessary for the several purposes mentioned; that at the time mentioned in the complaint as the time of the appropriation of the water of the creek by the appellants and their grantors, one Jack Sears, in consideration that the respondent would permit him to dig and construct the ditch through the respondent's lands, promised and agreed with the respondent that the latter should have the exclusive use of the water flowing through the ditch, at any point on his premises which he might desire, to turn it out for irrigating purposes during the spring and summer months; and that, in accordance with said agreement, the respondent has so turned the water out of the ditch, and appropriated and used the same for irrigating purposes upon said lands, each and every spring and summer since the ditch was constructed, and the water thereby appropriated, as he had a right to do under said agreement with the original appropriator of said water; and the respondent has so appropriated and used said water as mentioned without hindrance or objection from any one until the commencement of the suit by appellants; and that the acts complained of by them in their complaint were the turning of the water out of the ditch by respondent in the month of April, 1887, for the purposes of such irrigation.

2. That respondent has had the adverse, exclusive, and uninterrupted possession and use of said water through said ditch for irrigating purposes every spring and summer since the ditch was constructed, and such possession and use thereof in its natural channel long prior to the construction of the ditch and for more than twenty years before the commencement of the suit.

3. That in addition to the premises mentioned as having been made by said Sears in consideration of the respondent permitting him to dig and construct the ditch through the respondent's land, Sears promised and agreed with the latter that whenever he got done with using the water through the ditch, he would not sell or dispose of the ditch or water right to any one else, but that the ditch and water should revert and become the property of the respondent, and that Sears long since got done with using the ditch and water.

The appellants demurred to the new matter contained in the answer as not being sufficient to constitute a defense. The court overruled the demurrer, and the appellants filed a reply specifically denying said new matter. The case having been heard by the circuit court upon depositions and proofs taken therein, a decree was given dismissing the complaint, which is the decree appealed from.

I think the evidence fully sustains the allegations of new matter in the answer as to the agreement and circumstances under which the ditch was constructed and the water for the use of the mining claims thereby appropriated; also as to the reservation made by the respondent of the use of the water of the creek for the purpose of irrigating his land during the spring and summer months, and of his custom and habit of using it during such periods for the purpose mentioned, and for such other purposes as he might desire to use it about his premises.

The situation of the creek, its importance as a means of irrigation, and its necessity in many other respects, are so apparent that no man of any prudence would permit its waters gratuitously to be appropriated without making such a reservation as claimed.

It is easy to see how a person situated as the respondent was could be induced to allow another to construct a ditch across his land and use it to conduct water to mining grounds during a period of the year when he himself did not need it; but it would be difficult to understand why he would do so at a time when it was highly necessary that he should have the water for his own use, unless he granted the privilege for a consideration which he deemed sufficient to remunerate him for the injury and inconvenience he would thereby necessarily subject himself to.

The respondent seems to have been willing that Sears should have the right to use the water during the time he did not need its use, and I think we may reasonably conclude from the testimony and the circumstances surrounding the affair that the arrangement between the parties was to the effect that Sears was to have the right to use the water at all times during which the respondent did not require it for irrigating his land, watering his stock, and for domestic purposes about his house.

The respondent claims that the agreement between him and Sears was, that the latter should not sell or dispose of the ditch and water right to any one else, but that both should revert to him when Sears got done with using the water through the ditch.

Sears, however, in 1867, sold his mining ground, together with the ditch and water right, to certain Chinamen, who, in 1876, sold to Thomas Chavener, and the latter, in 1886, sold to B. W. Huston, one of the appellants; and the said respective grantees have been using

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the water and ditch ever since, and the respondent has acquiesced in such use; besides, the license, after it was executed, created a right of property.

Under these circumstances, therefore, the respondent at this late date would not, it seems to me, have any right to claim a reversion of the property in consequence of its alienation. I think we may infer, after the lapse of so long a time, that the respondent consented to the transfer.

A person will not be allowed to avail himself of a forfeiture of valuable rights unless he claims it immediately on the happening of the condition upon which it depends. He cannot remain passive in such a case for a long time after acts have transpired upon which others have relied in matters of importance to them, and then enforce a forfeiture in consequence thereof.

If the respondent had desired to avail himself of the benefit of the condition in the agreement with Sears, upon the happening of which the ditch and water right were to revert to him, he should have claimed it immediately after the sale to the Chinamen. Instead of doing that, however, he allowed the affair to run along about twenty years without any apparent objection, and then insisted upon his right to the reversion, which he has himself forfeited by his own laches. But it does not follow that the appellants acquired any right in the ditch and water superior to that which Sears himself had. The interest of the latter therein was limited by the terms of the license or privilege, and he could convey no greater right than he possessed, whatever he may have undertaken to do. Nor could purchasers from his grantee acquire any right beyond that unless they could show that the respondent in some manner had represented that the grantee was the absolute owner of the property, and that they had been induced to make the purchase upon the faith of such representation.

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The case is not like that of a sale of real property to a *bona fide* purchaser, where an outstanding equity exists. Sears had no deed from the respondent of any interest in the ditch, and a purchaser from him was bound to inquire as to the extent of his interest.

The appellants allege in their complaint that for more than twelve years they and their grantors have had the adverse, exclusive, uninterrupted use and enjoyment of all the water of the creek, and used it for their mining claims with the knowledge of the respondent. They claim, I suppose, that they have maintained such adverse possession ever since the execution of the deed by the Chinamen to Chavener.

The latter, however, only had such right in the property as he acquired from the Chinamen, which was no greater right than Sears possessed, and was all that he was able to convey, or had any right to undertake to convey, although the deed executed by him purports to convey the absolute title to the ditch, and contains a general covenant of warranty.

An assumption, however, upon the part of the grantor to convey a greater interest in property than he possesses will not effect a transfer of it, nor extinguish outstanding rights of the character of those in question.

The appellants must therefore rely wholly upon their claims of adverse possession, in order to defeat the right of the respondent to use the water from the ditch in the manner mentioned. And I do not think they can establish it under the circumstances of this case, unless the respondent had actual knowledge that the appellants claimed to be the absolute owners of the ditch and water right, or had knowledge of facts from which such a claim would necessarily be inferred. They must certainly prove more than the fact that they have conducted the water through the ditch, and used it in their mining operations dur-

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ing the period alleged, as such use was entirely consistent with the license. The proof must establish an exclusive use of the water under a claim to so use it, regardless of the reservation in favor of the respondent in the agreement between him and Sears, under which the latter was permitted to construct the ditch; and I have strong doubts about the appellants being able to maintain that it is sufficient for that purpose.

The evidence shows beyond question that the respondent has been accustomed to use the water from the ditch for irrigating his lands and for the use of his premises generally every year since the ditch has been constructed; that his use thereof has been openly and notoriously exercised under a claim of right as original owner of the water.

The appellant's counsel appear to be under an impression that if the appellants have been in the use and enjoyment of the ditch under a claim of right for a period beyond that of the statute of limitations, they have acquired a title to it by prescription, and that such title is necessarily exclusive of any right on the part of the respondent to use the water thereof. They seem to ignore the fact that the appellants and the respondent may both have rights to use the water. It seems to me that there is nothing inconsistent in the view that the appellants may have the right to use the water for mining purposes, and the respondent the right to use it for irrigation, for the use of his stock, and for household purposes; and that both rights may coexist. That seems to have been the understanding in the outset, and I do not see how time and usage have changed it; nor can I discover how the affair can be better adjusted than to accord to the respective parties the right to use the water in the manner suggested.

According to my view of the matter, the respondent should have the use of it when necessary for the purposes mentioned, and the appellants should have the right to

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use it at all other times. There may be a short period during each year when both parties may desire to use the water at the same time; in such case, the respondent should have the preference; but he should not be allowed to waste it, or to use it imprudently, or to any greater extent than is actually necessary. The exercise of a reasonable spirit of accommodation by the respective parties in regard to the use of the water will render it beneficial to both, and will to a great extent avoid a conflict of interest.

The appellant alleges in his complaint, as has been shown, that the respondent, on the first day of April, 1887, wrongfully and maliciously diverted the water from the ditch, and deprived the appellants of its use and enjoyment, and still continued to do so, and refused to desist therefrom. If I believed that the evidence in the case sustained this allegation, I should be in favor of perpetually enjoining the respondent from the commissions of such acts; but the evidence of William Cook shows that all the water that was taken out of the ditch at that time was for the purpose of irrigating a crop of alfalfa, and that if it had not been so used, the respondent would not have had a crop; that it was young alfalfa, sown the spring before; that there were about five acres of it, and that it required more water than old alfalfa does; and I cannot find from the appellants' brief that any testimony was given on their part in regard to the matter.

The appellants' counsel, it would appear, were too intent upon establishing an exclusive right in behalf of their clients to the use of the water to show what acts the respondent did on that occasion beyond the fact that he diverted it from the ditch. But that, as I view the case, is not sufficient. The appellants have acquired no such right, and should not insist upon it until the right which the respondent reserved to himself, when he permitted the ditch to be constructed, is lawfully extinguished.

The decree appealed from must be affirmed.

Points decided.

[Filed December 19, 1888.]

GEORGE A. HARTMAN, RESPONDENT, v. J. N. YOUNG,
APPELLANT.

ELECTIONS—VOTERS—BEST EVIDENCE OF THE INTENTION OF.—It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intention and choice of the voters.

BALLOTS—MUST BE PRESERVED FROM TAMPERING—OFFICIAL COUNT.—In determining a contested election, the evidence of the ballots actually cast will control that furnished by the official count, provided the ballots have been preserved and protected from tampering.

OFFICIAL RETURNS—PRIMA FACIE EVIDENCE OF RESULT OF ELECTION.—The official returns when duly certified are *prima facie* evidence that the result is as declared, but such returns or canvass is never conclusive, unless made so by statute. As a *quasi* record, it is entitled to the presumption of regularity, and is *prima facie* evidence of its integrity.

ELECTION CONTEST—BALLOTS BEST EVIDENCE.—As between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence.

ONUS PROBANDI—PLAINTIFF MUST PROVE THAT BALLOTS OFFERED TO IMPEACH THE OFFICIAL COUNT ARE GENUINE.—The burden of proof rests on the plaintiff. He must establish to the satisfaction of the jury or trial court that the ballots have been kept intact, and are the genuine, identical ballots cast at the election, otherwise they will receive no credence and be rejected as unworthy of credit.

STATUTE—DIRECTORY WHEN.—Provisions of the statute for the safe-keeping of ballots are treated by the courts as directory, and when it is shown that the ballots have been securely kept and preserved inviolate, they will not be excluded as evidence on account of some omission to comply with their directions.

BALLOT-BOX—PRESERVING OF THE BALLOTS.—Where the court finds that the ballots have been safely kept and preserved, that no one has tampered with them, and, notwithstanding the opening of the box for the purpose stated, that the ballots were the genuine and identical ballots cast by the voters of South Pendleton precinct, the legal conclusion drawn therefrom by the trial court, viz., that "such ballots are the best evidence and entitled to be recounted," is in conformity with law, and such as it pronounces on that state of facts.

APPEAL from Umatilla County.

D. W. Bailey and W. M. Ramsey, for Respondent.

Richard Williams, J. C. Leisure, and Fred Page Tustin,
for Appellants.

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LORD, J. — This was a proceeding under the provisions of title 4, chapter 14, sections 2544–2548, Oregon code, to contest the right of the defendant to the office of county clerk of Umatilla County, to which he was declared elected by the board of canvassers of said county.

In substance, the facts alleged impeach the correctness of the returns as certified, in the wrongful and erroneous counting of the votes of South Pendleton precinct, etc., whereby the defendant was declared duly elected, etc.

The answer, after making the usual denials, alleged affirmatively and separately that the poll-book of said precinct, signed and attested as required by law, was certified and returned to the plaintiff, then county clerk of said county, showing that an election had been held in that precinct at the date therein stated, giving the number of votes, and that the defendant had received the majority, etc., that the same was duly canvassed by the board, etc., and that the defendant was duly elected county clerk of said county; that the ballots polled at said election in said precinct were duly enveloped and sealed as required by law, and returned to said county clerk, etc., and that he, being then and there a candidate for the office of county clerk, etc., after he had received the said ballots, enveloped and sealed as aforesaid, did unlawfully break the seal and remove therefrom the said ballots, etc., and ever since the same have been in the hands of said plaintiff in a loose and unprotected condition, affording an opportunity for changes and alterations of said ballots, and on account of such circumstances the said ballots ought not to be recounted, etc.

The reply put in issue the affirmative matter set up, and the trial proceeded to judgment in favor of the plaintiff.

It thus appears upon the issue made by the pleadings that the subject-matter upon which the contest is based

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is the recount of the vote of South Pendleton precinct, and which, according to the judgment, if allowable, is conclusive of the right of the parties.

For the determination of the question presented by the record, it perhaps would have been more satisfactory to the court if counsel for the defendant had requested the court below to make its findings fuller in respect to the particular facts upon which such question is raised.

The difficulty, however, seems to have been that he acted upon the hypothesis that the evidence as to the preservation of the ballots of South Pendleton precinct failed or was incompetent to establish their identity as a matter of law, and therefore inadmissible, when the only way, it would seem, the question which he seeks to have litigated and determined can be raised on this record is, Is the judgment and legal conclusion which the trial court draws from the facts found such as the law pronounces?

It will therefore be necessary to state the substance of some of the evidence to show hereafter that it was competent and admissible, and also to show there was evidence tending to support the findings of the trial court in the particular questioned by this record.

The evidence certified to us in the record discloses that the poll-book, the ballot-box and the ballots therein, of South Pendleton precinct were duly delivered to the clerk after the election, and the ballot-box, according to the testimony of Mr. Watron, one of the judges of the election, "was sealed over the slit on the top with my name on it, and had two strips of paper around it, both sealed. . . . The box could not be opened without tearing the papers off"; that the contestant, who is county clerk, received the poll-book and ballot-box of said precinct, and the key to the box, on the fifth day of June, and kept the box in the vault in the condition as delivered until the twelfth

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day of that month, when he took it from the vault and carried it into the main office, where the vote was being canvassed, and in the presence of the other two members of the board, and several other persons who were present and overlooking the canvass, and opened it for the purpose of finding the poll-book, on the assumption that it was locked up in the box, as was the case in some of the other precincts; that he only raised up the ballots, and seeing that the poll-book was not there, immediately returned them into the ballot-box and relocked it, and that soon after he found the poll-book in the vault where he had deposited it when handed to him by Mr. Watron; that the ballot-box and its contents so locked, but not resealed, were returned to the vault, which was made of brick, with iron doors, and which stood open during the day, and that no one had a key to the ballot-box but himself, and that he and his deputy had a key to the vault; that various persons were permitted to go into the vault, such as he knew, and remain one and two hours; that the box remained on the shelf in the vault until called for by this proceeding, undisturbed, and that it had been kept by him safely, and had not been exposed to the public, or been tampered with, and that the box had never been opened except as stated, or in the possession of any one except himself, and that the contents of the box were the same as when he received it.

Substantially, upon this evidence, the trial court found "that it appeared to the satisfaction of the court, and that affirmatively, on part of the contestant, George A. Hartman, that the said ballots of South Pendleton precinct for Umatilla County have been kept safely by himself, the custodian of the same, as by law provided; that said ballots have not been exposed to the public, or handled by unauthorized persons, and have been identified as the ballots cast by the voters of said South Pendleton precinct

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on June 5, 1888, and have been preserved intact; that they are genuine, and have not been tampered with; that they have been kept in the vault of the clerk's office of said county and state, locked in the ballot-box of said precinct, since their delivery into the custody of said Hartman, county clerk of said county and state, on June 5, 1888, continuously, until the canvass of the votes on June 12, 1888, when said box was removed into the clerk's office of said county, and for the purpose of finding the poll-book of said precinct, and then and there unlocked in the presence of the board of canvassers, and the ballots therein tied together in one package, as such said package was lifted up and out of said box by said Hartman, and by him at once returned into said box, and the said box was relocked in the presence of said board, and upon the conclusion of said canvass the said box and ballots so locked therein were returned to the said vault by said Hartman, where it and said ballots have remained continuously since said date until removed therefrom on the trial of this action, on July 16, 1888." And as a conclusion from such facts finds "that, as such ballots of said precinct, they are entitled to be admitted as the best evidence and recounted," etc.

From this statement, it becomes apparent why counsel for defendant is anxious to reach the evidence by his exception, and have the court pass on its admissibility as a matter of law, or failing in that, that the court shall regard and treat the proceeding under the statute to contest the election in the nature of a suit in equity so that the court may examine the evidence and try the case *de novo*.

Upon this last proposition, it is sufficient to say that the proceeding under the statute is to be tried as an action at law without the intervention of a jury, and it may be said that in all cases where the object of the action is to determine the right to an elective office, whether under the

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statute or by an action in the nature of *quo warranto*, the ballots actually cast by the voters are the original evidence of the result of the election.

The remaining question suggested is, that the ballot-box and its contents were not admissible in evidence, for the reason that they have not been properly kept, or so kept as to preclude opportunity for tampering with the ballots.

The contention is, that the facts in evidence so impeach and discredit the genuineness of the ballots admitted by the court and recounted as to destroy their character as the best evidence, and therefore it was admissible to recount them, because the official count as declared, under the circumstances, was the better evidence, and should control in determining the result. It is admitted that in determining a contested election the evidence of the ballots actually cast will control that furnished by the official canvass, provided the ballots have been duly preserved and protected from the reach of any unauthorized intermeddling or tampering.

But it is insisted, unless it is made to affirmatively appear that the ballots have been so carefully kept and protected as to place their identity beyond all reasonable doubt, they ought not to be allowed to overturn the official count. Hence it is earnestly urged that where the evidence in the record discloses that the ballots have not been kept and protected with that vigilant care which the law contemplates, or where they have been so exposed as to afford such opportunity for handling or tampering with them as to cast suspicion on their purity, they lose their character as the best evidence, and are not to be relied on in determining the result of an election, and therefore ought not to be admitted to overturn the official count.

At the outset, it may be said, that the official returns or canvass when duly certified is *prima facie* evidence that the result is as declared. As against ballots not properly

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kept, and the identity of which is not shown, such official canvass, although secondary, is the better evidence. But the official canvass, unless made so by statute, is never conclusive. As a *quasi* record it is entitled to the presumption of regularity and *prima facie* evidence of the integrity of the result of election as declared. But as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence.

"It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intention and choice of the voters." (*Hudson v. Solomon*, 19 Kan. 177; *Reynolds v. State*, 61 Ind. 423; McCrary on Elections, 291, 439; Cooley on Constitutional Limitations, 625.)

When, therefore, it is shown to the satisfaction of the court that it has before it the identical ballots cast by the voters, as between the ballots themselves and canvass of ballots by the election officers, the ballots are controlling. To show that they are the genuine ballots cast by the voters, any evidence tending to show that they have been so kept and protected from tampering as to place their identity beyond reasonable doubt is admissible. The burden rests on the plaintiff; he must establish to the satisfaction of the court or jury, as the case may be, that the ballots are the genuine ballots cast at the election, otherwise they will receive no credence. When the ballot-box and the ballots therein of South Pendleton precinct were produced and offered in evidence, if it was shown that they had been properly kept and protected as the law required, they were the best evidence.

On the other hand, if it was shown that they had not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity from intermeddling with them, they are the weakest and most unreliable evidence. But this only goes to the credibility of such evidence, and not to its competency.

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Evidence may be extremely weak, and in fact, as against other evidence, entitled to no credit, yet that does not effect its admissibility. The weight to be given to the evidence and its admissibility are diverse matters.

In *People v. Livingstone*, 79 N. Y. 288, Church, C. J., said: "Although it must be conceded that the security of the boxes were not made so perfect as to preclude the possibility and even some probability that access might have been had to them for improper purposes, yet I do not think the judge would have been justified in deciding as a matter of law that they had not been preserved inviolate, and in withdrawing the question from the jury."

And again: "The statute requires the ballot-boxes to be preserved undisturbed and inviolate, and it is incumbent on the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was on the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. . . . After the election, it is known just how many votes are required to change the result. The ballots themselves cannot be identified; they have no ear-marks. Everything depends upon keeping the ballot-boxes secure, and the difficulty of doing this for several months, in the face of temptation and opportunity, requires that the utmost scrutiny and care should be observed in receiving the evidence, etc. Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be

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shown with a reasonable degree of certainty. If the boxes have been vigilantly preserved, the ballots are the best and highest evidence, but if not, they are not only the weakest but most dangerous evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud has been committed."

In the same case, in 13 Hun, the court say: "If the ballots voted at any election are produced on the trial of a cause like this, they are the very best evidence of the result of the election. Of course, the jury must be satisfied of their inviolate preservation, otherwise they will receive no credence; but this does not affect their competency."

Judge Cooley says: "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or if received, that it should be left to the jury to determine upon all the circumstances whether they constitute more reliable evidence than the inspector's certificate, which is usually prepared at the close of the election, and upon an actual count of the ballots as then made by the officers whose duty it is to do so." (Cooley on Constitutional Limitations, 625; *People v. Sackett*, 14 Mich. 320; *People v. Cicott*, 16 Mich. 116.)

According to their decisions, it is manifest that in a proceeding of this nature the ballots are receivable in evidence for the purpose of controverting the official count and ascertaining the actual result from the vote cast, and that it is for the jury or trial court, as the case may be, to determine, from all the facts and circumstances going to show that the ballots have been preserved inviolate, whether they are more reliable than the official count. Of course, the jury must be instructed or the court guided

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by the principle of law that unless it is proved that the ballots are genuine,—the identical ballots cast,—they should be rejected, and not allowed to overturn the result as declared by the official count. As a consequence, the ballots and the proof of their identity was competent evidence, and if competent, it was admissible. The credibility and weight to be attached to evidence is usually for the jury, or the trial court when it is exercising the jury function, and if it is satisfied from the evidence produced that the ballots have been preserved intact and inviolate, the court, governed by the law which makes them in such case the best evidence, would recount the ballots, otherwise they would receive no credence, and be rejected in determining the result.

It may be admitted that the question is not free from doubt, and apparently there is some conflict in the practice, yet we have reached the conclusion, not without much hesitation, it is true, that there was such a showing as to the safe-keeping of the ballots; that they were competent evidence to go to the trial court to determine as a matter of fact upon all the circumstances whether they had been so kept as to preserve their identity, and to render them more reliable evidence than the official count.

It seems to us, however, the better and more proper way, especially in proceedings to contest an election under the statute, to reach the question sought to have decided is to inquire whether, upon the facts found by the trial court, the conclusion to which it has come, viz., "the ballots are the best evidence, and entitled to be recounted," is such as the law pronounces. To do this the findings should have been fuller and ought to have included the facts that the ballot-box was delivered to its legal custodian sealed; that the poll-book was delivered to him also, and deposited in the vault; that the box was opened for the purpose stated, and relocked and so returned to the

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vault, and that his deputy and other persons had access to the vault.

Adding these facts to those already found, and which upon suggestion the court would have no doubt included in its findings, would there be error in the conclusion already drawn upon the facts as thus presented by the finding?

The assumption or the argument is, that the box when returned to the vault duly relocked, but not resealed, created such an opportunity for tampering as to invite outrage with almost perfect immunity against discovery; that when opening the box when the poll-book was in the vault was without excuse, and an unlawful act committed by the contestant, whereby he made for himself and his friends an opportunity to intermeddle with the ballots without detection, and which the law had not given to him, but was designed to prevent, and that such a condition of facts so thus shown by the findings are inconsistent with that safe-keeping which the law contemplates as sufficient to identify the ballots and authorize them to be recounted.

Counsel says: "*When he broke the bond of secrecy which the law had placed around that ballot-box, why did he not then and there, in the presence of other members of the board, reseal it, and in such a way as that its purity could not be questioned?*"

The trouble with this argument is, that it is based on the supposition that the law directs and requires the ballot-box to be sealed, when it only requires the ballots to be enveloped and sealed, and deposited with the clerk.

It may be admitted that it was the duty of the plaintiff as its legal custodian to safely keep and preserve the box and its contents, and that any act, whether done by himself or others, which disturbed or violated the safeguard which the law had thrown about it, ought, at least, to find

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its justification in the particular circumstances which rendered such act necessary, and be supplemented by the doing of such things as to place it *in statu quo*, or find its equivalent in the sense of the law for that purpose.

But sealing the box is not one of the safeguards which law has thrown about the ballot. Besides the cases shown, when by acts of omission or commission, through inadvertence or mistake, it sometimes happens that the poll-book is deposited in the ballot-box, or the returns inclosed in the envelope among the ballots, and it becomes necessary to procure them to make the canvass of votes, and the box is opened, or the envelope, as the case may be, such acts or omissions are treated as irregularities, and the provisions of the law in respect thereto as directory only, and will not defeat the ballots as original evidence, provided they are properly accredited and have been safely kept and preserved inviolate. In *Hudson v. Solomon*, 19 Kan. 180, the ballot-box was unlocked for the purpose of taking out the poll-book, and under the facts the court regarded the opportunity for tampering with the ballots, and discrediting them as too slight for serious consideration.

In *O'Gorman v. Richter*, 31 Minn. 29, the ballots were not enveloped and sealed as required by section 88, and for this reason it was claimed that they were inadmissible. But the court say: "That the provisions of this section are merely directory, and that where it is clearly and satisfactorily proved that the ballots have been kept intact and inviolate, in the same condition as when counted by the judges of election, they are admissible in evidence, although not sealed up in envelopes as required by statute"; and further, that the trial court, "being satisfied of the genuineness of these ballots beyond a reasonable doubt, have admitted them," and that "certainly we, acting as an appellate court, cannot say they erred."

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In *Dorey v. Lynn*, 31 Kan. 760, the ballots were wrongfully opened and counted by the city council as a canvassing board, and they remained with the city clerk when they should have been placed in the custody of the county clerk, and yet as "the evidence and findings of the court below show that the ballots in this case were never tampered with in any manner except as already stated," the court say "the ballots were identified beyond all reasonable doubt," and as a consequence entitled to be recounted as the best evidence.

In *Patton v. Florence*, 17 Pac. Rep. 177, the poll-book was placed under cover and seal, except that they were inclosed in an envelope or package with the ballots, etc., and the court treated the matter under the facts as an irregularity, and not fatal to the proceeding.

The object of all such provisions is to secure the safe-keeping of the ballots, so that they may be easily identified in case they need to be resorted to in some judicial inquiry; and if they have been safely kept and protected from any tampering, the chief object of the law is subserved, although omissions or irregularities may have occurred such as we have adverted to.

The ballots are the best evidence of the will and choice of the voters, and if it is shown or the facts find that they have been securely kept and preserved inviolate, they are entitled to be recounted, that the will of the electors may be carried into effect, and allowed to prevail. Nor is there anything in *Kingsly v. Berry*, 90 Ill. 520, relied upon by counsel, inconsistent therewith. The court say: "The ballots may have been tampered with. There is not full proof that they were not. There was a motive for such tampering, at least upon the part of the appellee, if not others engaged with him. The wrong-doers should not be allowed to profit by his violation of the sanctity of

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the ballot-box. He might do so were there ballots to be received as the identical ones cast by the voters."

But it is to be noted in this case that "the court was not sure that it had before it the identical ballots which were deposited by the voters," and hence applied the rule which the law declares in such case, where, by intermeddling, suspicion is brought on their purity, they are not to be regarded as the best evidence and entitled to be recounted as against the official canvass.

In *Powell v. Holman*, 6 S. W. Rep. 508 (Ark.), the court found that after the vote had been canvassed and abstracted by the clerk as required by law, the ballots were placed for about one week in a library-room adjoining the clerk's office, and that this was an unsafe and exposed place, which afforded opportunity for them to be tampered with, and as a conclusion from these facts finds that the ballots are unworthy of credit as evidence.

In commenting upon this conclusion being such as the law pronounces upon the facts found, the court say: "The authorities are abundant that where ballots have been so exposed as to have afforded opportunity to be tampered with, and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity, and are no longer to be relied on as evidence in a contest of judicial inquiry as to the result of an election." (McCrary on Elections, 293; Cooley on Constitutional Limitations, 625.)

Hence the court say, with reference to the ballots upon the facts found, that the trial court pronounced the judgment of the law when it declared such ballots as unworthy of credit as evidence and refused to recount them. But there are no facts found in that case, as here, in respect to the safe-keeping of the ballots; they were not zealous'y cared for, but were so exposed as to afford opportunity for parties or their friends to tamper with the

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ballots, or add to or take from their number, and as a result, suspicion was brought on their purity and integrity, and the court rejected them as unworthy of credit.

Here the court finds that the box and its contents were securely and safely kept and preserved, that no one had tampered with them, and that, notwithstanding the box had been opened in the manner and for the purpose stated, the ballots therein were the genuine and identical ballots cast by the voters of South Pendleton precinct; and necessarily the conclusion which the trial court reached and finds upon this state of facts, viz., that such ballots "are the best evidence, and entitled to be recounted," is in conformity with such as the law declares.

In view of the fact that the contestant is the legal custodian of the box and its contents, it no doubt would have been better and more circumspect after the box was opened to have resealed it in the same presence, although there is no such requirement in the statute, and the failure to do so violated no law.

Upon the finding as to the safe preservation of the ballots, we are bound to assume there was satisfactory evidence to support it; or if we looked at the evidence in the record to ascertain whether there was any evidence tending to support such finding, we are confronted with the direct and positive, uncontradicted, and unimpeached testimony of all the sworn officers who have exercised any control over the box and its ballots that it had been safely kept relocked as the law required, and that its contents had not been handled or disturbed.

So that in whatever way the objection raised may be regarded, we discover no error, and must affirm the judgment.

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Points decided.

[Filed December 19, 1838.]

WILLIAM F. HAINES, RESPONDENT, v. THOMAS HALL, APPELLANT.

17	165
19	381
20*	831
24*	252

17	165
29	589

17	165
37	12

17	165
639	451

NAVIGABLE STREAM — WHAT IS. — The doctrine that a stream of water is navigable if of sufficient extent and capacity to float logs and timber from mountainous regions to market, and may thereby be utilized for the benefit and advantage of the community at large, cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs and timber a short distance.

EQUITY — COGNIZANCE OF IN CASE OF TRESPASS. — Equity will not take cognizance of an ordinary matter of trespass, or of the violation of any legal right, unless the circumstances are of such a character as to bring the case under some recognized head of equity jurisdiction. Equity will, however, afford a remedy in such cases where the remedy at law is incomplete and inadequate to give such relief as the nature of the case demands.

NAVIGABLE STREAM — CASE IN JUDGMENT. — Where a small stream of water only about twenty feet in width where confined within its banks, and about thirty-five in other places, ran across the farm of W. F. H. and emptied into another stream two miles below, which during four or five weeks in the year increased in volume, by the melting of snows in its vicinity, sufficiently to enable T. H. to float logs down it by stationing a large number of men along its banks "to break jama," by arranging logs along the stream so as to confine the water in a narrower channel at points where the banks were not sufficient to prevent its spreading out, and by constructing reservoirs above and opening them so as to make a greater flow in a given length of time: *held*, that the stream was not navigable in the sense which made it a public easement. And where it appeared that the attempted use by T. H. of the stream as mentioned resulted in destroying its banks, extending it in width, in diverting its waters from the channel, and causing them to overflow the land of W. F. H., which was in cultivation, and wash off the soil of a material part of his lands, and that T. H. claimed the right, and threatened to continue such practice, and it further appearing that W. F. H. had already sued a former party in an action at law for attempting to exercise a similar right, and had recovered the sum of fifty dollars as damages on account thereof: *held, further*, that equity should interfere and prevent T. H. from carrying his threats into execution.

STRAHAN, J., dissenting.

STREAM — TEST AS TO ITS NAVIGABILITY. — A stream which has sufficient capacity during seasons of high water continuing for a sufficient length of time to enable a person to float some logs to market, or to a place where

Points decided.

they may be manufactured into lumber, is subject to the public easement as a passage-way for such logs. To the extent that it is useful for that purpose, it must be deemed navigable.

ID. — CAPACITY — TEST OF. — The actual capacity and utility of a stream for the purpose of commerce, or the floating of logs or other commodities to market, is the test of the public right of passage.

PUBLIC RIGHT — LIMITED TO STREAM. — The public right is confined to the stream and measured by its extent, and does not extend to the shore.

DRIVING OF LOGS — USE OF SHORE. — The right to float logs on a stream does not include the right to occupy the shore for the purpose of aiding in driving them, or of dialodging those which have become jammed.

USE OF SHORE. — One floating his property down a stream has no right, without a license from the riparian owner, to use the banks of the stream to aid him.

MERE TRESPASS NOT ENJOINED. — The ordinary rule is, that a mere trespass will not be enjoined. Something more is necessary before equity will interfere, such as preventing irreparable injury, avoiding multiplicity of suits, and the like.

TORTS — WHEN NOT ENJOINED. — Ordinary wrongs or torts are never enjoined. The damages or injury sustained from them are not generally irreparable, and a party will be left to his remedy at law. *Seemle*, when the injury complained of reaches the very substance and value of the estate and goes to the destruction of it, in the character in which it is enjoyed.

LORD, J., concurring.

NAVIGABLE STREAM. — A stream which has floatable capacity at certain periods, recurring with regularity, and continuing a sufficient length of time to make it useful as a highway for floating logs, is navigable; but, to be navigable in this sense, it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce.

NAVIGABLE STREAM. — Where the facts show that a stream is not navigable for floating logs without doing irreparable injury to the estate through which it flows, and the defendant claims a right to use such stream for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat the numerous trespasses which the exercise of such right necessarily involves: *held*, that the plaintiff was entitled to an injunction to prevent irreparable injury and to avoid a multiplicity of suits.

APPEAL from the Circuit Court for the county of Union.

R. Eakin & Brother, for Respondent.

Baker, Shelton, & Baker, and *G. G. Bingham*, for Appellant.

Opinion of the Court — Thayer, C. J.

THAYER, C. J. — This appeal is from a decree rendered in a suit brought by the respondent against the appellant, to enjoin the latter from floating logs down what is known as Anthony Creek, and to have an account taken of damages done to respondent's premises in consequence of the appellant using and attempting to use said creek during the years 1886 and 1887.

The respondent owns two forty-acre subdivisions of land, situated partly in Union and partly in Baker counties, upon which he has resided for some time, using it as a farm. The creek is a small stream running through the land, down which the appellant claims and exercises the right of floating saw-logs during its highest stages of water, insisting that it is a navigable stream. The respondent denies its being navigable, and alleges that the appellant is doing irreparable injury to his land in attempting to use it for such a purpose. He also alleges that the appellant threatens to, and will unless restrained by the court, continue to use said stream, and that he has already suffered damages to a large amount, occasioned by the acts of the appellant in that particular. The respondent sought by his suit to have decided a question which is more within the province of a jury to determine than that of a court.

But the right to run saw-logs down this Anthony Creek has heretofore caused litigation. The case of *Haines v. Welch*, 14 Or. 319, arose out of a claim to damages in consequence of using it for such purpose; and the circumstances surrounding it are of a character that would indicate that it is liable to be a source of constant contention. Besides, the circuit court seems to have thoroughly investigated the affair, and given it a candid and judicious consideration. I think, therefore, it will be better for all parties to entertain jurisdiction of the case and make a final disposition of it.

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The respondent may have been captious in regard to the use of the stream by the appellant, but the land belonged to him, creek and all, and the appellant had no right to attempt to run his logs down the creek, unless its capacity was such as to render it capable of serving an important public use as a channel of commerce.

The case is not one of casual trespass, but it is one where a right is claimed, which, it is apparent, will be attempted to be exercised continuously; and if the creek, as a matter of law applicable to the facts proved, is not a public easement, the appellant should desist from attempting to run his logs down it, and the respondent has the right to enjoy his premises unmolested.

The right to acquire private property is said by Blackstone to belong inherently to every one, but it would be of little value if a party were not allowed to enjoy it free from disturbance.

The circuit court in its findings found as follows: That the respondent was, and for nine years past had been, the owner in fee of the land; that it was inclosed by a fence, had a dwelling-house and outbuildings thereon, was occupied by respondent as a home, and had been used by him for general agricultural purposes during his ownership, and that it was of the value of eighteen hundred dollars; that Anthony Creek entered said land at or near the northwest corner, and ran in a southeasterly course, and passed out near the southeast corner, being a distance of about three fourths of a mile, considering the sinuosity of the stream; that it entered North Powder River a short distance below where it left the respondent's land; that the creek on the respondent's land, and for a mile and a half above there, is a small, shallow, rapid, crooked stream, with a general width of twenty to thirty-five feet, as it appeared in 1886, having banks from eighteen to thirty-five inches high, but which frequently fell away on one

and sometimes on both sides, leaving nothing but a gravel bar for many feet, with little or no bank at all; the flow of water in the creek during the previous summer and fall was very limited, not exceeding twenty or thirty inches, miners' measure; but usually during the latter part of May and first of June the melting snows in the mountains near by causes the water to increase until the banks in narrow places are nearly full, but where the banks are broken away on one or both sides, the water, unless confined by artificial means, spreads out until it becomes a depth of not more than sixteen or eighteen inches, even in high water; the annual rise of the water is fairly regular in amount, time, and duration of occurrence; that the banks of the creek on the respondent's land are composed largely of black loam, which washes readily when disturbed in any manner; that the width of the stream did not increase materially for ten years prior to the spring of 1885, but since that time it has increased one third; that in the spring of 1886 appellant deposited in the bed of the creek, at a point about one and a quarter miles above the respondent's land, about one million feet of saw-logs, and attempted to float them to a point below said land; that eighteen men were engaged for twenty-five days in getting these logs to float during the highest water of the season, but the attempt was an utter failure; few, if any, of the logs passed respondent's land at all, the drive being less than two miles, and that there was no evidence showing that the flow of water in that year was less than usual; that no attempt was ever made to float logs in the stream prior to 1883, and the attempts made in 1884 and 1885 were slight and unsuccessful; that in the spring of 1887 the appellant deposited in said creek, about a mile and a quarter above the respondent's land, two million three hundred thousand feet of saw-logs, for the purpose of floating them to a point below said land; that only one

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million four hundred thousand feet of these logs, and of the one million feet placed in the stream in 1886, and of an unknown quantity placed there prior to that time, ever reached their destination, a point about seven miles below where they were started; and that in order to secure such result, the appellant employed on two miles of the creek, and stationed along the bank, from twenty-five to thirty-five men with cant-hooks and other appliances to prevent the logs from lodging, to roll them back into the stream, drag them over gravel-bars, turn them around bends in the creek, break jams, etc.; that these men labored in this way on this particular two miles of creek twenty-seven days; that then the logs frequently formed jams, piling up in such quantities as to force large amounts of water out of the bed of the stream onto respondent's land; that in order to break these jams it was often necessary for eight or ten men to get hold of a single log with cant-hooks, and drag it for a considerable distance over bars, which process was continued until about a third of the logs in the jam were moved, when the others would usually float; that in attempting to navigate the stream, the appellant placed logs, where its banks were low, at an angle to the stream, so as to expose about one half their length to the action of the water, thereby forcing the water against the opposite bank, so as to increase its depth at that point; also built a reservoir above the respondent's land, so as by discharging it to increase the volume of water in the creek; that while attempting to float logs, the water in the creek constantly overflowed by reason of logs being in it; the creek was almost full of logs for thirty-eight days; at one time sixteen hundred of them were in the creek on respondent's land; for five days a thousand logs were in the creek on his land, and not one moved; in 1887, 276 logs were at one time on the bank of the creek on respondent's land, and

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51 were left in the stream, and 130 out of the stream on his land; that in floating logs both in 1886 and 1887 the appellant washed out the respondent's fence where it crossed the creek, and washed out his private bridge, which he had used for many years for passing to and from different parts of his farm; that in attempting to navigate said stream, appellant had committed no less than thirty separate and distinct trespasses, many of them irreparable in their nature, and that he threatened to continue such trespassing; that Anthony Creek is not capable of serving an important public use as a channel of commerce by the floating of saw-logs, and that such floating cannot be done so as to be of practical benefit; that by reason of the wrongful acts and injuries committed by the appellant in attempting to navigate said creek in the years 1886 and 1887, the respondent had been damaged in several amounts, aggregating the sum of three hundred dollars.

I have examined the evidence submitted in the case, and think it fairly supports the findings of the court; nor do the appellant's counsel, in their brief, attempt to show to the contrary, except as to the amount of damages which the court found to have been sustained by the respondent.

The nature of the damages was such that the amount could not be ascertained by direct proof; they were of such a character that they could not be computed with mathematical accuracy.

In this kind of cases a party can do nothing more than to prove the facts and leave the jury, or court when tried without a jury, to estimate the damages. The respondent could not possibly show the amount of his injuries in dollars and cents; the greater part of the injury doubtless consisted in the annoyance, perplexity, and disturbance to which the respondent was subjected in consequence of

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the acts of the appellant; and it is the province of a jury or court in such a case to make a fair estimate of the amount which a party should pay for occasioning such annoyance, perplexity, and disturbance.

This affair of the appellant's attempting to navigate his logs down Anthony Creek through the respondent's land has been going on during two seasons, and in any view was wrong. If he had a right to use the waters of the creek for such purpose, he had no right to station his men along its banks to float the logs, or allow the logs to go onto the respondent's land or injure the banks of the creek, or turn the stream out of its banks onto the land.

No one has the right to use the property of another for his own convenience without the consent of the latter. The right to acquire, enjoy, and control private property in any manner not injurious to the rights of others is a natural as well as a constitutional right, and no injury arising out of an infringement of it should be allowed to pass unredressed.

Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

A stream that cannot be used without employing the means and appliances which the appellant made use of in order to float his logs down this one certainly ought not to be regarded as a public highway for any purpose.

The circuit court found, as we have seen, that Anthony Creek is not capable of serving an important public use

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as a channel of commerce; and I think its findings in that particular is fully warranted by the evidence in the case. Courts went to the extreme verge of authority to interfere with or abridge private rights when they held that a stream of water included within a private grant constituted a public easement in any case. Such holdings bear a strong resemblance to the encroachment upon the immunity guaranteed in the constitution that private property shall not be taken for public use without just compensation.

It would, in my opinion, be much more in consonance with the spirit and principles of our government to have left the matter to be regulated by the legislature, which has authority to pass laws for establishing public highways, and to provide for such compensation.

We are, however, committed to the doctrine that a stream of water which is of sufficient extent and capacity to float logs and timber from mountainous regions to market, and can be utilized thereby for the benefit and advantage of the community at large, notwithstanding it is included with the land owned by private individuals, is, nevertheless, a public navigable stream for such purposes; and we must accept that doctrine as the law. But I am not willing to extend it so as to include every little rivulet or brook which runs across a man's farm, although its waters may be so swollen for a short time every year by the melting snow in its vicinity as to enable logs and timber in limited quantities to float down it, and, by the adoption of extraordinary means for that purpose, convenience one or two neighbors in so using it.

The appellant's counsel strongly insist upon the rule that a court of equity will not entertain jurisdiction in ordinary matters of trespass. I am mindful of the rule, and have no intention or desire to depart from it. I would not undertake to maintain that a court of equity has juris-

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diction to take cognizance of the violation of any legal right, unless the circumstances are of such a character as to bring the case under some recognized head of equity jurisdiction.

Equity, however, affords a remedy to enforce a legal right when the remedy at law is incomplete and inadequate to give such relief as the nature of the case demands; and I think the respondent can reasonably invoke the benefit of that principle in this case. I do not regard it as an ordinary case of trespass; the respondent has his little farm, which he is endeavoring to cultivate, in order, I suppose, to provide a living for himself and family. Parties interested in timber a short distance above his farm claim the right to float it down a small stream which runs through his premises, to his detriment and annoyance. He has already had litigation with one party for attempting similar acts. That fact is alleged in the complaint in this suit, and the records of this court substantiate it. He brought an action in the said circuit court against a certain party on account of similar acts, and recovered a judgment against him for the sum of fifty dollars damages, which this court in the case before referred to affirmed.

Thereafter, this appellant engaged in the same scheme; and others we may presume are liable to engage in it also; and if the respondent were compelled to protect himself by bringing an action for each trespass, it would soon utterly impoverish him. The evidence in the case shows, and we can easily understand, that the injury, being done to his premises on account of such acts, is permanent and irreparable; and he certainly ought to have the right to have it specifically determined as to whether or not they are subject to the servitude claimed. It is the only way I can discover by which the right and title to the premises can be effectually quieted. The respondent,

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it is true, can have it determined in an action at law as to whether or not the stream is navigable as claimed; but in the mean time the appellant will be enabled to destroy its banks, thereby widen the stream and wash away other portions of the soil adjacent thereto, which will be the natural and proximate result of the course he has been pursuing.

I am of the opinion that the decree appealed from should be affirmed.

STRAHAN, J., dissenting.—The object of this suit is to restrain the defendant from floating saw-logs down Anthony Creek, which creek flows through the plaintiff's lands, in Union County, Oregon; also to restrain the defendant from maintaining a certain dam across said creek above the plaintiff's premises, and for damages which it is alleged the plaintiff has received by reason of various trespasses upon his lands by defendant, committed in running said logs.

The plaintiff, by his amended complaint, alleges, among other things, that a small, shallow stream, known as Anthony Creek, flows in a southeasterly direction through plaintiff's land, diagonally dividing it in two equal parts, and fertilizes and irrigates said land, and is the boundary line between Union and Baker counties, and that the plaintiff owns both banks and the bed of said Anthony Creek, where it passes through his land, for a distance of about one half a mile; that the defendant, during the spring and summer of 1886, and the winter of 1886 and 1887, cast and deposited in Anthony Creek, above plaintiff's said lands, saw-logs cut from timber above plaintiff's said lands, at various places, and is proposing and threatening to continue to do so for the purpose of attempting to transport or float said logs by means of said creek from said places through the plaintiff's said lands to a point

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on North Powder River, below the plaintiff's land, and below the mouth of Anthony Creek, a distance of five miles or more, where the defendants are preparing to erect a saw-mill as soon as the spring freshet comes in the spring of 1887; that said logs amount to more than four million feet, and are piled and banked into and along the banks of said creek at various places above plaintiff's said land; that during the spring of 1886 the defendant cast and deposited in said creek a large quantity of saw-logs, and in the month of June, 1886, attempted to drive and float about one million feet of said logs down said creek and across the said lands of the plaintiff, by means of which and whereby the defendant injured, displaced, and wasted the plaintiff's said lands, and tore, cut, and carried away the substance of the soil thereof, and wrongfully committed waste thereon, and upon the plaintiff's said lands; that about the first of June, 1886, the defendant and his employees, in preparing and attempting to float said logs, broke the plaintiff's inclosure upon said lands, and wrongfully entered the plaintiff's said lands, and broke and carried away his fences at two places where the same crosses said creek upon the plaintiff's said lands, to his damage in the sum of twenty-five dollars; and by reason of the same being broken and kept open by the defendant, plaintiff was compelled to and did herd the stock off of his crops for one month, to his damage in the sum of twenty-five dollars; that about June 11, 1886, the defendant, in preparing to float said logs in said creek through the plaintiff's said lands, broke up, carried away, and destroyed plaintiff's bridges across said stream, to his damage in the sum of five dollars; that during the month of June, 1886, defendant in so attempting to float said logs in said creek caused the same to form a jam or dam across said creek, and dammed the same at a point above the plaintiff's lands, and at the

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head of the plaintiff's irrigation ditch, whereby the water was diverted from said ditch and the same was injured, and the plaintiff was thereby and by reason thereof deprived of the use of the water of said creek upon said lands of the plaintiff for the purpose of irrigation, to his great damage in the sum of seventy-five dollars; that in so attempting to float said logs in the month of June, 1886, the defendant floated, rolled, and pushed upon the plaintiff's said land in said creek a large quantity of logs, to wit, about 250, and that said logs so remained and still remain on the plaintiff's said land, and on the banks of and in said creek, to plaintiff's damage in the sum of one hundred dollars; and by reason of said logs being in said creek since June, 1886, plaintiff has been prevented from getting to said creek with his stock, except with a great deal of trouble and inconvenience, to plaintiff's damage in the sum of five dollars; that by reason of said logs being in said creek on plaintiff's said land, the same has caused, and continues to and will cause, the water of said creek to wash away the banks thereof, and change the channel thereof, and has during all of said times obstructed the flow of the waters of said creek across said lands of plaintiff, to his damage in the sum of ten dollars; that in preparing and attempting to float said logs in said creek in June, 1886, the defendant cut down and destroyed eight of plaintiff's growing trees on said land, to his damage in the sum of twenty dollars.

All of the foregoing wrongs were suffered by the plaintiff, as he alleges, prior to the commencement of this suit. The part of the amended complaint relating to threatened injuries is as follows: That said creek is shallow, and not navigable for boats or canoes, and has low banks, and in its natural state is not navigable for railroad ties or saw-logs except in the spring freshet or rainy season of the year, and is unfit to be used by the public or otherwise as a

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means of transporting or floating logs to the defendant's proposed saw-mill on North Powder River or elsewhere through the plaintiff's said lands; that the defendants are preparing to and will float or attempt to float a large quantity of saw-logs down said Anthony Creek from a point on the banks thereof above the lands of the plaintiff, to wit, about four million feet of said logs, down said stream through said lands, to North Powder River, and threatens to continue to float or attempt to float said logs down said stream through plaintiff's said lands for years to come; that by reason of the nature of said stream, low banks, and small volume of water and narrow channels, it is not possible to successfully float logs down it through the plaintiff's lands, to be beneficial to commerce or to the defendant, and any attempt to do so will result in irreparable injury to the plaintiff's land; that said attempt to so use said stream will result in endless litigation and a multitude of actions without a complete remedy to the plaintiff, unless the court inhibit and restrain the defendant from so floating logs in said stream; that the floating of logs in said Anthony Creek, the maintaining and manipulating of said dams by the defendant, as threatened by him, will result in great and permanent injury to the plaintiff's said lands, and will cut away the banks of said stream, change the channel thereof, flood plaintiff's lands with water, deposit thereon logs, gravel, and *debris*, wash out and cut away the meadow and soil from plaintiff's said land, interrupt the plaintiff in the tillage of said land, and the caring for his crops and stock thereon, cause the removal of plaintiff's fences, and expose his lands and crops to the trespasses of stock, and that such threatened trespasses, injuries, and damages by the defendant will necessarily result in irreparable injury to the plaintiff's said lands, and great damage to the plaintiff, which cannot be compensated in damages, and, unless

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restrained by this court, will result in the financial ruin of the plaintiff.

Before the defendant answered the amended complaint, the plaintiff, by leave of court, filed a supplementary complaint, in which it is alleged that the particular damages which plaintiff feared have been sustained by him by reason of the attempt by the defendant to run said logs down said stream, the particular items of which are specified, aggregating about \$955. The answer to the amended as well as the supplemental complaint denied almost all of the material allegations therein except the cutting and putting in of the logs, and the defendant's intent to run the same down said stream to North Powder River.

By way of separate defense it is alleged that said Anthony Creek mentioned in said complaint is a navigable stream for saw-logs, railroad ties, and other timber, and can be successfully used in transporting and floating logs, ties, and other timber down the same through the plaintiff's said land; and other parts of said creek can be thus used beneficially to commerce during the annual freshets in each year, in ordinary seasons.

The evidence was taken upon an order of reference for that purpose, and the cause tried by the court, and a final decree entered in favor of the plaintiff, enjoining the defendant, his agents and servants, from floating logs in said stream across the plaintiff's land, or attempting to do so, and for three hundred dollars damages, and for costs and disbursements, from which decree this appeal is taken.

1. It appears from the evidence that Anthony Creek is a small, rapid, and somewhat tortuous mountain stream, taking its rise only a few miles above the plaintiff's lands and empties its waters into North Powder River, a few miles below. Where it flows through plaintiff's lands, it varies in width from ten to thirty feet; its banks are low and alluvial, and lined with a dense growth of willows,

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except at four different places, one 84 feet, one 135 feet, another 100 feet, and still another place 110 feet. The depth of the water is from two to four and one half feet deep. The stream is mainly fed by mountain springs, but during the months of June and July of each year it is swollen by the melting snow in the mountains, at which times it is capable of floating saw-logs to a limited extent, from a point above plaintiff's lands, to its mouth. The defendant floated sixteen hundred thousand feet of logs down said stream during the year 1886. But I think it evident the defendant, in his anxiety to get logs to his mill, forced the stream beyond its capacity. In other words, he put a greater quantity of logs in said stream than could be conveniently floated, and thus caused them to jam so that their progress was stopped until relieved by gangs of men using cant-hooks and other appliances. To accomplish this the men engaged in driving traveled up and down the banks of the stream on the plaintiff's land, doing no greater injury to the premises than walking over the same.

By the common law, all streams are navigable where the tide ebbs and flows, while all others were held not to be navigable; but this distinction has not generally prevailed in this country. The true test seems to be whether or not the particular stream is navigable in fact; that is, capable of being used for transporting to market the products which grow along its banks. Nor is it necessary that it should be at all times capable of being so used. If a stream during seasons of high water continuing for a sufficient length of time to enable any person to float saw-logs to market, or a place where they may be manufactured into lumber, such stream is subject to the public use as a passage-way, and to the extent that it is useful it must be deemed navigable. (*Weise v. Smith*, 3 Or. 446; *Felger v. Robinson*, 3 Or. 455.)

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In the latter case it was said by this court: "We hold the law to be, that any stream in this state is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year to constitute them such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined, as any other question of fact, by a jury. Any stream in which logs will go by force of the water is navigable." And the same doctrine is asserted by this court in *Shaw v. Oswego Iron Co.*, 10 Or. 371.

Numerous other authorities are to the same effect. (*Brown v. Chadbourne*, 31 Me. 9; *Olson v. Merrill*, 42 Wis. 203; *Morgan v. King*, 35 N. Y. 454; *Hickok v. Hine*, 23 Ohio, 523; *Whisler v. Wilkinson*, 22 Wis. 572; *Sellers v. Union Lumbering Co.*, 39 Wis. 525; *Holden v. Robinson Mfg. Co.*, 65 Me. 215; *Gerrish v. Brown*, 51 Me. 256; *Morgan v. King*, 30 Barb. 1.) I think these authorities abundantly show that actual capacity and utility of a stream for the purpose of floating logs or other commodities to market is the test of the public right of passage.

Nor is this right of passage lost or impaired because in its exercise trespasses may have been committed on the premises of the riparian proprietor. In a proper action the wrong-doer is responsible to such riparian owner for all such damages. The public right is confined to the streams and measured by its extent, and does not extend to the shore, except under particular circumstances to land or to secure the floating property to the shore temporarily and in a reasonable manner, and so as not to obstruct others in the free use of the stream. Such right in the use of the stream does not include the right to occupy the shore for the purpose of aiding in driving logs or dislodging those which have become jammed.

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The right to raft logs down the stream does not involve the right of booming them upon private property for safe-keeping and storage any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores. (*Lorman v. Benson*, 8 Mich. 18.) Perhaps the true rule of law on this subject is stated by Ryan, C. J., in *Olson v. Merrill*, 42 Wis. 203. He said: "We of course recognize the position that the navigable character of a stream cannot depend upon trespass on the shore, and that one floating his property down a stream has no right without a license to use the banks of the stream to aid him. But it appears to us to be begging the question to assume that because it is convenient, and persons are accustomed so to use the banks, therefore the stream is not navigable without trespass upon them. We take it that a stream which is of sufficient capacity to float logs is of sufficient capacity to float some kind of boat or skiff in which the owner may follow his logs. And if there be some places where, in consequence of bars or other obstructions, neither logs nor boat will pass without human help, the boat may be aided down the stream as well as the logs, so that the logs may be floated through the streams without trespass upon the banks. This might probably be inconvenient, and even sometimes dangerous. But the stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use. Indeed, we gather from cases which have come before us that the same practice prevails on some of the larger streams in this state. But the navigable character of a stream does not rest on the tortious practice, but on the capacity of the streams to be lawfully used. And we cannot hold that the right to use a public highway, by land or by water, is lost even by habitual trespass upon adjoining lands."

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So it was said by the Supreme Court of Maine, in *Hooper v. Hobson*, 57 Me. 273: "The right of the public in a stream capable of being used for floating logs, or as a passage-way for boats and barges of sufficient capacity to be useful in commerce or agriculture, is not thus to be extended over adjoining lands. The water makes and defines the highway. The facilities of transportation afforded by it are privileges which, like those of air and light, are too great to be suffered to become the subjects of private property. But the exercise of the common privilege must not be made an occasion for encroachment upon that which is legitimately the exclusive property of another. The right which the public enjoy in a navigable or floatable stream is, in general, limited by its banks. The proper definition of the word 'bank' in this connection is, a steep acclivity on the side of a lake, river, or the sea. These banks are the boundaries within which the exercise of the common right must be confined. Except during the continuance of an overflow, or in the exercise of those privileges which are given and defined by statute, log-owners and river-drivers have no rights in a floatable stream beyond those boundaries. Important as their business undoubtedly has been and is, it must be conducted with due regard to the rights of others. Their liability to pay damages to the riparian proprietor for traveling upon the banks to propel their logs is expressly recognized in *Brown v. Chadbourne*, 31 Me. 9, relied upon by the defendant here."

In *Brown v. Chadbourne*, 31 Me. 9, referred to in the above extract, the doctrine under consideration is thus stated: "If the plaintiff and others were in the habit of going upon the banks of Little River to drive their logs, it does not appear but that they might have confined themselves to its waters, though it might be more inconvenient for them so to have done. Their want of care in

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the use of the river, creating a necessity to commit trespasses to relieve their property, would not prevent it from being public, nor justify the defendant in obstructing it. They would be responsible in damages for any trespasses committed."

2. But without at this time deciding whether or not Anthony Creek is a *floatable stream* for saw-logs in which the public have an easement for that purpose, it appears to me that this suit ought not to be sustained for other and different reasons from those already suggested. If this creek be not a floatable stream in which the public have an easement, all of the acts of the defendant on the stream where it runs through the plaintiff's lands, as well as those upon the land itself, were trespasses, for which he is liable in an action at law.

The ordinary rule in such cases is, that equity will not interfere to enjoin a trespass. Something more is necessary before equity will interfere, such as preventing irreparable injury, avoiding a multiplicity of suits, and the like. Chancellor Kent says, in *Livingston v. Livingston*, 6 Johns. Ch. 497: "There must be something *particular* in the case so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy."

Ordinary wrongs or torts are never prevented by injunction. The injuries they inflict are not irreparable, and in such case the party must be left to his remedy at law. (*Cross v. Mayor of Norristown*, 18 N. J. Eq. 815; *Mulvany v. Kennedy*, 26 Pa. St. 44; *Gause v. Perkins*, 3 Jones Eq. 177; *Willard's Equity*, 382.)

It is not doubted that where the injury complained of reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed, such injury may be prevented by injunction.

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But I think the proof fails to make a case within this principle. Conceding the stream to be private, the floating of the logs on it across plaintiff's land would not constitute such injury, nor would the use of the banks to assist in driving them. I cannot find from the evidence that the logs caused any *debris* deposited on plaintiff's land, or that the banks of the stream were broken or washed by reason of the logs passing down the same.

3. Nor will an injunction be allowed unless the right set up and sought to be protected is free from all reasonable doubt. (2 High on Injunctions, sec. 698.) Nor when the defendant is in possession until the title is established at law, unless a strong case of irreparable mischief is made out, nor where the plaintiff's title is in dispute and has not been established at law. (2 High on Injunctions, sec. 698.) By this suit we are called upon to determine the title to this stream, and to assess damages growing out of its alleged wrongful use by the defendant. His right to use it depends upon the facts which ought to be tried by a jury, and the estimate of damages, if any, made by them. They are questions peculiarly within their province, and I think ought not to be withdrawn from their consideration. To allow a case like this to be finally determined in equity would be to make a precedent which, if followed, would invade the right of trial by a jury in a large class of cases where the constitution declares the same shall remain inviolate.

[Filed March 14, 1869.]

LORD, J., concurring.—That the stream in question was not navigable within the meaning of the authorities for the transportation of timber or logs, and is not subjected to the public rights of user for that purpose, seems to me to be established by the testimony beyond controversy. Even the testimony for the defendant is pregnant with proof

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that the stream cannot be used for this purpose without constant and continuing trespass when used for floating logs, and that in its natural state it is not of sufficient depth and width to float the products of the forest to market.

It is hardly possible to read the testimony, in which it appears numerous men were placed along the stream to aid and push the logs along its channel, of the jams and standing of the logs, in consequence of its want of depth and width for such floatage, of the destruction of its banks in several places, and the overflow on the adjacent lands of the plaintiff incident to such use, and the injury necessarily resulting therefrom, without the conviction that the stream has not navigable capacity and is not susceptible of beneficial use to the public for that purpose.

We do not mean to say by this that to be navigable a stream must have a sufficient volume of water to be at all times and during all seasons capable of being used for the purpose of valuable floatage, and as a channel of trade and commerce. It is enough if it has floatable capacity at certain periods, recurring with regularity and continuing a sufficient length of time to make it useful as a highway for floating logs. Such has been the holding of this court. (*Folger v. Robinson*, 3 Or. 457; *Shaw v. Oregon Iron Co.*, 10 Or. 381, 382.) But a stream to be navigable in this sense must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade, or, as has been said, "to float the products of the mines, the forests, or the tillage of the country through which it flows, to market."

Perhaps as good a test of the navigability of such streams is found in the case of *Rhodes v. Otis*, 33 Ala. 578. It is there said: "In determining the character of a stream, inquiry should be made as to the following points: Whether it is fitted to valuable floatage; whether the pub-

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lic or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors or included in the surveys; whether, if declared public, it will probably in future be of public use for carriage." (*Pelies v. Railroad Co.*, 56 Ala. 528.) Tested by this rule, there is scarcely a particular in which the stream in question would not be condemned as non-navigable for the transportation of logs. It is not only not adapted to a public use, but the public have made no attempt to use it for any purpose. It is, therefore, perfectly evident that the defendant has no right to float logs down this stream through the lands of the plaintiff. While this, however, is not much contested, it is strenuously urged that the question of navigability is a question of fact for a jury, and the case, therefore, does not authorize the interference of equity. But this is not so.

The case of *Meyer v. Phillips*, 97 N. Y. 490, is so on all fours with the case in hand, and so direct an adjudication and authority for such equitable interference, that we quote it *in extenso*.

"But it is claimed," says Earl, J., "that the facts of this case do not authorize equitable interference or sustain the jurisdiction of an equity court. The defendants threatened to float a larger number of logs over the plaintiff's land, using the stream and its banks for that purpose, and they would thus do some damage to the banks of the stream and other lands of the plaintiff. They would occupy the stream for several days. Not only this, they claimed the right to float the logs, and asserted in sub-

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stance that they would do so whenever they chose to. By continuing to exercise the right, they might, by lapse of time, be able to prove and establish a right by prescription. They not only claimed a right for themselves, but for the public,—for everybody. That in such a case, upon such facts, a plaintiff may maintain an equitable action to quiet his title and settle his right, and prevent the threatened injury, is abundantly settled by authority. (Angell on Watercourses, sec. 449; 2 Story's Eq. Jur., sec. 927; 3 Pomeroy's Eq. Jur., sec. 1351; *Holmar v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Campbell v. Seaman*, 63 N. Y. 568; *Johnson v. City of Rochester*, 13 Hun, 285; *Swinton Water Works Co. v. Wilts and Berks Canal Co.*, L. R. 7 H. L. 697; L. R. 9 Ch. 451; *Clowes v. Staffordshire Potteries*, 8 L. R. 9 Ch. 125, 142.) This is not a case where the defendants threatened only to commit a single trespass, but they threatened to commit and claimed the right to repeat the trespass every year. Here a preventive action was proper to prevent an irreparable injury within the meaning of the equitable rule, and also to avoid a multiplicity of suits."

The case in hand possesses all these features, with added aggravation. It is incontestable that the stream would not float these logs without extraneous aid, and in rendering this the banks had to be used, and were damaged, and in places destroyed, and the plaintiff's meadow overflowed and rendered useless.

The facts show that in the attempt to make the logs float down the stream, thirty or forty men were employed with cant-hooks and other appliances, for the period of twenty or thirty days during the season of highest water, to aid in the transportation of these logs; that in this attempt to navigate the stream for this purpose no less than thirty separate and distinct trespasses were committed, many of them irreparable in their nature, and

Points decided.

reaching to the destruction of the estate in the character in which it was enjoyed.

The defendant not only asserts his right to use the stream for such use, but he claims a like right for the public. More: he threatens to commit and claims the right to repeat, not a single trespass, but the innumerable trespasses which the facts show must follow its exercise; that, in such case, the plaintiff is entitled to an injunction to prevent irreparable injury, and to avoid a multiplicity of suits, is established by the authorities beyond controversy.

The motion for a rehearing is denied.

[Filed December 29, 1888.]

J. E. FENTON, APPELLANT, v. RODNEY SCOTT,
RESPONDENT.

17	189
18	557
20	34
20*	95
23*	655

17	189
23	483
20*	95
32*	298

17	189
33	393

EVIDENCE — ELECTION CONTEST — ONUS PROBANDI. — The law is well settled that the burden of proof is on the plaintiff, when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the genuine ballots cast by the voters.

ID. — BALLOTS BEST EVIDENCE OF INTENTION OF VOTER — IDENTITY OF MUST BE FIXED BEYOND REASONABLE DOUBT. — While the ballots when identified are the best evidence and are to prevail over the official count, yet to entitle them to be resorted to and be recounted, the facts going to show their preservation must fix their identity beyond all reasonable doubt.

BALLOTS PROOF OF IDENTITY — CHARACTER OF EVIDENCE TO ENTITLE SAME TO BE RECEIVED. — But this does not require that they must be proved genuine beyond all possible doubt, or beyond a mere possibility that they might have been interfered with. All that is required is that they be proved intact and genuine with a reasonable degree of certainty, and to the full satisfaction of the court.

EVIDENCE — BALLOTS, PROOF OF IDENTITY OF. — Where the facts found do not disclose affirmatively that the ballots have been so safely preserved as to satisfy the trial court, beyond reasonable doubt, of their integrity or identity, and as a legal consequence refuses to recount them to overturn the official count: *held*, that their rejection was no error.

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VOTER — INTENTION OF. — Where a ballot discloses a name written opposite to a printed name erased, the intention of the voter is to substitute the written for the erased name.

ID. — WHERE UPON A BALLOT THE NAMES OF TWO REPRESENTATIVES were erased, and opposite, but slantingly in consequence of the narrow margin upon which to write, two other names are written, and one of the names so written was a candidate for county judge on another ticket, but the printed name of the county judge on such ticket was not erased: *held*, that the facts did not disclose a case within the provisions of section 2523, Oregon Code.

APPEAL from the Circuit Court for the county of Lane.

L. Bilyeu and J. J. Walton, for Appellant.

Washburn & Woodcock and Condon & Dorris, for Respondent.

LORD, J. — This was a proceeding under the provisions of title 4, chapter 14, sections 2544–2548, Oregon Code, to contest the right of the defendant to the office of county judge of Lane County, to which he was declared elected by the board of canvassers of said county.

Without adverting to the pleadings, it is sufficient to say the contest proved adverse to the contestant, and it is from the judgment rendered therein that this appeal is brought.

There are but two questions presented by this record, or in fact earnestly urged by counsel for the contestant, which we shall deem it necessary to consider. One of the main questions—in fact, the main one argued in the brief—which counsel for the contestant seeks to raise is the same question as counsel for the defendant sought to raise in *Hartman v. Young*, *ante*, p. 150, just decided, namely, that the proceeding under the statute to contest an election is in the nature of a suit in equity, and is to be tried by this court *de novo* upon the evidence, or failing in that, that it is the duty of this court to say as a matter of law, upon the evidence as to their safe preserva-

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tion, that the ballots were the best evidence and entitled to be recounted. Both of those questions were decided adversely to this contention in *Hartman v. Young*, and we must refer to them, without further argument, for an expression of our views.

But there is no difficulty upon the facts found and presented by this record in having considered the identical question claimed as error and decided.

The findings of the court in this case are stated with a fullness, particularity, and accuracy that is creditable, and in a way that enables this court to determine the correctness of the legal conclusions drawn therefrom. And this is especially so in regard to the facts found as to the care taken of the ballots and all other matters in relation thereto, so that the correctness of the conclusion drawn by the trial court and questioned by counsel for the contestant is fully presented for our consideration and decision.

In a case like this, the law is well settled that the burden of proof is on the plaintiff when he seeks to introduce the ballots to overturn the official count to show affirmatively that the ballots have not been tampered with, and that they are the identical ballots cast by the voters. The authorities to this point are numerous, and are cited and discussed in *Hartman v. Young*, and need not be recalled here. The inquiry now is, Is the legal conclusion which the court below draws upon the facts found such as the law pronounces?

Upon the findings of fact as to the ballots of North Eugene and South Eugene precincts, the trial court declared as a conclusion of law that they were not "sufficiently identified to entitle them to be received in evidence to contradict the official returns," and consequently rejected them. The reason for this, in law, must have been because, under the facts, there was a want of

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that affirmative showing necessary to establish the identity of the ballots as the ones actually cast by the voters of those precincts.

Without unnecessarily encumbering the record, the court found as follows: "That the poll-books and sealed packages purporting to be the ballots cast at said election in North Eugene precinct, and the poll-books and a like package purporting to be the ballots cast at said election in South Eugene precinct, were delivered to the clerk of Lane County, Oregon, by one of the judges of the election from each of said precincts some time between June 4, 1888, and June 8, 1888, — the exact date of said delivery does not appear from the evidence in this case; that said package purporting to be the ballots of said precincts were by said clerk deposited in a safe in his office, where they remained until the official canvass of the vote of said county was made, on June 8, 1888, when they were taken from the said safe of the said clerk and deposited in an open pigeon-hole in the vault, where they remained until about two days after this contest was instituted. The said vault is a room adjoining the office of said clerk, in which the public records are kept, and opens into said office, and is accessible to and used by any person who may have occasion to examine the public records of said county, and such persons pass in and out of said vault during office hours whenever they desire so to do; that owing to some defect in the door of the vault it cannot be and was not closed at any time during the time said ballots were so deposited therein; that said clerk or his deputy was generally in said office during office hours, but occasionally for a short time both would be out and the door of said office not locked; that said packages were taken from the vault by said clerk, and he testified on this trial that he found them in just the same condition as they were when he put them in, and that they have remained

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in his possession ever since delivered to him, and he did not know of any one handling said ballots but himself, and in his opinion they were in the same condition when offered in evidence on this trial as when delivered to him by the respective judges of said election, and that the said packages or either of them had not been opened to his knowledge since they were delivered to him; that said package purporting to be the ballots of North and South Eugene precincts, respectively, were sealed up when offered in evidence in this case, and were each opened by the judge of this court in the presence of the parties hereto, and their counsel, and counted with the result stated in my twelfth and eleventh findings of fact; that no evidence was offered or given on said trial, showing or tending to show that the package delivered to said clerk, purporting to be ballots of North Eugene precinct cast at said election contained all the ballots so cast, or when said package was sealed up, or by whom, or how long after said election before the same was delivered to the county clerk, or in whose possession or custody the same remained during said time; that the judges of election of South Eugene precinct sealed up or intended to seal up all the ballots cast at said election in said precinct after the count was completed, but there was no evidence offered or given on this trial showing or tending to show what time elapsed between the time said ballots were so sealed up and their delivery to the county clerk, or in whose possession or control the same were during said time, or whether the ballots so sealed up was the same package delivered to the said county clerk."

It will be noted, according to the facts found, that the packages purporting to contain the ballots of each of these precincts were identified by the clerk as the packages delivered to him by one of the judges of each of said precincts; that a part of the time he kept them in his safe in

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the office, and another part of the time in an open pigeon-hole in the vault; that the vault was not locked in consequence of some defect in the door, which prevented it from being locked, and that persons who wished to examine the records had access to the vault, but that the packages were in the same condition as when he received them, and were sealed when offered in evidence. Taking these facts as to their safe-keeping and identity, stretching from the time of his receipt of the packages until they were called for by this contestant, there was reasonable certainty that they and their contents had been preserved inviolate, but prior to their delivery to the clerk, and between that and the day when the election took place, there is an hiatus or gap which fails to make that affirmative showing that the law requires must be made to appear to overturn the official count.

While the ballots, when identified, are the best evidence, and are to prevail over the official count, yet to entitle them to be resorted to and recounted, the facts going to show their preservation must fix their identity beyond any reasonable doubt. If there has been such negligence in respect to their safe-keeping as to create reasonable doubts as to their integrity, there is a want of that affirmative showing which the law requires to entitle the votes to be recounted, and overturn the official canvass.

"It is incumbent on the party," said Church, C. J., "offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. . . . It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty." (*People v. Livingstone*, 79 N. Y. 290.)

"All that is required is, that they be proven intact and genuine, with a reasonable degree of certainty, and to the

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full satisfaction of the court. But this does not require that they must be proved genuine beyond all possible doubt, or beyond a *mere possibility* that they might have been interfered with. This would be practically to exclude them entirely under any circumstances." (*O'Gorman v. Richter*, 31 Minn. 31.)

Now, to avoid repetition, it will be sufficient to say, by recurring to the latter part of the findings, as to each of these precincts, there is a want of facts to disclose their identity during the period adverted to. There is no affirmative showing whatever, and we cannot bridge over the chasm by inference or speculation.

From the time when the count of the ballots began on the day of the election through all their migrations the ballots should be traced or accounted for, how enveloped, in whose custody deposited, and how kept, with reference to their preservation, until their delivery to the clerk. It may be that the trial court was disposed to draw the line sharply and critically, but to establish the identity of ballots, strictness of proof is required,—so strict as to their safe-keeping as shall exclude all reasonable doubt.

Upon the facts found, we are of the opinion that the law was rightly declared, and the evidence properly rejected.

The next question embodies two objections, and that is, that the conclusions of law as declared in numbers five and seven are not supported or authorized by the findings of fact respectively upon which they are based, namely, the ninth and twentieth findings of facts.

The twentieth finding is thus: "That there was cast in Mohawk precinct at said election one ballot upon which the name Joel Ware, candidate for county clerk, had been erased, and the name J. E. Fenton written in pencil for said office, and upon which the name Rodney Scott, candidate for county judge, had been erased, and the name L. Bilyeu written in pencil for said office; that there was

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no candidate by the name of J. E. Fenton for the office of county clerk, and no candidate for the office of county judge by the name of L. Bilyeu; there was no candidate for this office by the name of Fenton at said election for any office except this contestant for the office of county judge; that this ballot was not counted by the judges and clerks of said precinct for contestant for county judge."

Upon this finding the court declared, as a conclusion of law, that "this ballot should not be counted for contestant J. E. Fenton for the office of county judge."

The point presented and claimed to be error can be best shown by exhibiting the ballot:—

For Clerk.

~~JOEL WARE.~~ J. E. FENTON.

For Treasurer.

J. S. LUCKEY.

For County Judge.

~~REDNEY SCOTT.~~ L. BILYEU.

The contestant claims that this ballot should have been counted for him for the office of *county judge*.

In the absence of evidence *aliunde*, the intention of the voter is to be obtained from the face of his ballot. He has the lawful right to vote for others than those named and printed as candidates for the offices upon the ballots, or to vote for the candidates for other offices than those for which they have been nominated and placed upon the ticket. Nor is there any more decisive way of manifesting that intention than to mark out one name for a certain office designated and insert in the place thereof, or write directly opposite thereto, the name of some other person.

Looking at the face of this ballot, the voter has by his own deliberate act scratched out the name of Joel Ware,

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placed upon the ticket as candidate for clerk, and has written in place thereof J. E. Fenton, which we must take to have been his choice for that office, and not for county judge, and consequently there was no error in the law as declared by the court upon the facts stated.

As the next finding over which a contention is raised is long, the point may be more concisely presented by the face of the ballot. In explanation it is necessary to say that the margin to write on the ticket was narrow and not to exceed one half-inch in width, and doubtless accounts for writing the names in the slanting manner in which they appear on the ballot:—

Representatives.	{	C. K. HALE.	STAFFORD.
		GEO. A. DORRIS.	
		D. R. HARRIS.	

County Judge. J. E. FENTON.

The ticket was counted for the plaintiff Fenton by the judges of the election, but upon the facts as found the court held, by its legal conclusions, erroneously, and that it should be deducted from his vote, and not counted for either party. Scott was candidate for county judge on the other ticket, and the argument is, that as the name of Fenton is not erased, there are two candidates voted for by this ballot for the office of county judge, and that the case brings it within the provision of section 2528 of Oregon Code, that "if the ballot shall be found to contain a greater number of names for any office than the number of persons required to fill that office, it shall be considered fraudulent as to the whole of the names designated to fill such office, but no other."

The face of the ticket shows that the voter had erased the names of two of the candidates for representative, and in proximity thereto, as much as the narrowness of the

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margin would admit, and almost directly against each of the erased names, had written Scott and Stafford. By the act of erasing Dorris and Harris, we take it, the voter did not intend to vote for either of them, and the proximity, under the circumstances, indicates that it was his intention to supply their places by the names written. This would not only make it a lawful ballot as to all the offices for which there are names on the ticket, but it would fill the vacancies he created by his erasures, by the names put in their place by his own act.

As to Fenton there is no erasure or other circumstances which indicate that he wished to disturb his ticket as to his name, and we have a right to suppose that he intended to vote for him, unless there is something in his act, or concomitant circumstances, which repel that inference. He put no other name against it, or so near it as to indicate he wished to vote, or did vote, for two persons for that office. To give it that effect, you are compelled to disturb the arrangement as made by his act, render his ballot fraudulent as to the office of county judge, and deprive him of his vote for a representative for whom he has manifested his choice by his own act, and as he had a right to do.

It is our impression that the case is not one to which that section, *supra*, applies, and that the vote was counted correctly by the judges of the election for Fenton, and that the conclusion which the court declared as to the law upon the facts was error. This is our impression, but as suggested it is immaterial, as the error could not affect the result.

The judgment must be affirmed.

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[Filed December 20, 1888.]

JAMES F. RHOTON, APPELLANT, v. W. H. MENDENHALL, RESPONDENT.

CAUSE OF ACTION — WHEN IT ACCRUED. — When R. became surety for M. on a promissory note, and paid the same when it became due, R.'s cause of action accrued to him at the time of the payment: *therefore, held*, that if before such payment in another state where all the parties resided M. removed to the state of Oregon, the plaintiff's cause of action is not saved to him by the first clause of section 16, Hill's Code, for the reason that when the action accrued the defendant was not "out of the state."

SECTION 16, HILL'S CODE — CONCEALMENT OF DEFENDANT — CASE IN JUDGMENT. — The plaintiff signed the defendant's promissory note in Tennessee on the tenth day of February, 1869, and the defendant soon thereafter clandestinely left the state of Tennessee and never returned, and the plaintiff made diligent inquiry of his neighbors and others to find the whereabouts of the defendant, and the plaintiff did not know the whereabouts of the defendant until six months before the commencement of this action: *held*, this does not show that the defendant was concealed within the meaning of section 16, *supra*.

CONCEAL — MEANING OF. — The word "conceal," as used in our statute of limitations, means some affirmative act done in this state, such as passing under an assumed name, change of occupation, or any acts by the defendant which tend to prevent the community in which he lives from knowing who he is or whence he came.

APPEAL from Linn County.

J. J. Walton and John Kelsay, for Appellant.

D. R. N. Blackburn, for Respondent.

STRAHAN, J. — This is an action on an implied promise to recover money paid by the plaintiff for the use of the defendant on the tenth day of February, 1869, in the state of Tennessee. The defendant as principal, with the plaintiff as surety, made, executed, and delivered their promissory note to one Lewis McDaniel of said state of Tennessee, due one year after date, for the sum of two thousand dollars, with interest from date; that

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defendant neglected to pay said note, and the plaintiff paid the same and interest about the tenth day of February, 1870; that shortly after said note was made the defendant clandestinely left the state of Tennessee, and never returned; that plaintiff made diligent inquiry of his neighbors and other persons to find the whereabouts of the said defendant, but entirely failed to find his whereabouts until six months prior to the commencement of this action; that from the time the defendant left said state of Tennessee, where the plaintiff has and is now residing, until within the last six months, the plaintiff did not know the whereabouts of the said defendant, although he made diligent search and inquiry for the same; that as soon as plaintiff ascertained the whereabouts of the said defendant, the plaintiff made demand for the payment of said sum of money and interest thereon, and that the rate of interest in Tennessee at the time plaintiff paid said sum of money was six per cent per annum.

To this complaint the defendant demurred, on two grounds: 1. Because the same does not state facts sufficient to constitute a cause of action; and 2. Because the action has not been commenced within the time limited by the code.

The defendant had judgment on the demurrer, and the plaintiff appealed.

1. The only question presented on the appeal by counsel for appellant was the one suggested by the second objection taken by the demurrer, and to that our examination here will be confined.

Section 6 of Hill's Code fixes the limitation for this class of actions at six years. It is therefore barred, unless it is excepted out of the statute by some one of the saving clauses therein. This was conceded upon the argument by appellant's counsel, but they claimed that the right of action, under the facts disclosed by the record,

was saved by section 16 of Hill's Code. That section is as follows:—

"Sec. 16. If when the cause of action shall accrue against any person, who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state or the time of his concealment, and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

The cause of action accrued against the defendant when the plaintiff, as his surety, paid the promissory note to McDaniel on the tenth day of February, 1870. At that time the defendant was a resident of this state. Conceding, then, that a person who had not previously resided in this state "returns" to it, within the meaning of said section, when he removes from another state and takes up his residence here, the case is not brought within the first saving clause of the section, for the reason that when the action accrued the defendant was not "out of the state."

But the real question remains, and that is, Was the defendant "concealed" in this state when the cause of action accrued to the plaintiff in the state of Tennessee?

It cannot be overlooked that the plaintiff has failed to allege in his complaint that the defendant when said cause of action accrued was "concealed" in this state; nor is it alleged that after the cause of action accrued the defendant concealed himself so as to bring the case within the last saving clause of the section.

The only facts relied upon to show concealment in this state must be gathered from the complaint. They are, that shortly after said note was made, the defendant clandestinely left the state of Tennessee and never returned;

that plaintiff made diligent inquiry of his neighbors and other persons to find the whereabouts of said defendant, but entirely failed to find his whereabouts until within six months prior to the commencement of this action; that from the time the defendant left said state of Tennessee, where the plaintiff was and is now residing, until within the last six months, the plaintiff did not know the whereabouts of said defendant, although he made diligent search and inquiry for the same. Webster defines the word "conceal" to hide, or withdraw from observation; to cover or keep from sight, as a party of men *concealed* behind a wall.

It does not appear that the defendant did anything after his removal to this state whereby his identity or place of residence should be concealed, or kept secret, or hidden. In the absence of any statement to the contrary, and such is no doubt the fact, he lived openly in the community where he had fixed his residence in this state, without any effort or attempt in any way to baffle search or inquiry. These facts do not constitute *concealment* within the meaning of that term as used in our statute.

In *Frey v. Aultman*, 30 Kan. 181, the supreme court of Kansas gave a construction to the word "conceal" used in the statute of limitations of that state.

It appeared that the defendant had formerly resided in Iowa, that he absconded from that state and settled in Kansas, and that the plaintiff made reasonable efforts to find him, but failed. In passing on the question the court said: "We think the word 'conceal' contemplates some action here; that he passes under an assumed name, has changed his occupation, or acts in a manner which tends to prevent the community in which he lives from knowing who he is or whence he came. It cannot be doubted that the legislature has the power to make the statute of

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limitations absolute, and without any exceptions on account of concealment; and when we remember that this statute has no extraterritorial force, and therefore contemplates acts and conduct of the party within our limits, it would seem difficult to say that a man, who, going under his own name, lives in a community in as open and public a manner as any other citizen in the same line of business, is concealing himself from the service of process within this state." This construction is decisive of this case.

Counsel for appellant rely very much upon *Herman v. Hooker*, 73 Mo. 622; *Nelson v. Beveridge*, 21 Mo. 22; *Wells v. Halpin*, 59 Mo. 92; and some other like cases were cited by appellant, but they do not support his contention.

The Missouri statute under which their decisions were made provides: "If any person, by absconding or concealing himself, or by other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented."

These Missouri cases seem to turn more upon the effect of absconding or other improper conduct mentioned in the statute of that state than they do upon the concealment.

Indiana has a statute of limitations in criminal cases which precludes the accused party from availing himself of its benefits where he "conceals the fact of the crime." In construing that statute, the court held that the concealment must be the result of positive acts done by the accused and calculated to prevent the discovery of the fact of the commission of the offense of which he stands charged. (*Jones v. State*, 14 Ind. 120.) And this rule was applied and followed in a civil case. (*Stanley v. Stanton*, 31 Ind. 445.)

The point decided by this court in *McCormick v. Blan-*

Points decided.

chard, 7 Or. 232, does not arise here. In that case, at the time the cause of action accrued, all of the parties were residents of the state of Illinois, and so continued until about three years prior to the commencement of the action, since which time the respondent resided in this state.

It follows that the judgment appealed from was right, and must be affirmed.

[Filed December 20, 1888.]

MARY E. FURGESON, RESPONDENT, v. SARAH A. JONES, APPELLANT.

COUNTY COURT — JURISDICTION — WHAT NECESSARY. — To give a decree of the county court adopting a child any validity, such court must have acquired jurisdiction (1) over the parties seeking to adopt such child, and (2) over the child to be adopted, and (3) over the parents of such child.

NON-RESIDENT — NO PRESUMPTION OF JURISDICTION WHERE THE RECORD IS SILENT. — Where it affirmatively appears that an adverse party to a decree was a non-resident of the state at the time of its rendition, and the record is silent as to his appearance or notice, there is no presumption that such court acquired jurisdiction over his person.

DECREE WITHOUT JURISDICTION. — No person shall be personally bound by a decree until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. A judgment without such citation and opportunity wants all the attributes of a judicial determination.

COURT — GENERAL JURISDICTION — SUMMARY POWERS CONFERRED BY STATUTE. — Where a court of general jurisdiction has summary powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are no part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction.

ESTOPPEL — MUTUALITY. — Estoppels to be binding must be mutual.

ADOPTION OF CHILD — STATUTORY REQUIREMENTS. — A child by adoption cannot inherit from the parent by adoption unless the act of adoption is done in strict accordance with the statute.

[ON REHEARING. — FILED MARCH 12, 1889.]

THE RIGHT OF ADOPTION WAS UNKNOWN to the common law, and repugnant to its principles. Such right, being in derogation of the common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed.

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CONSENT LIES AT THE FOUNDATION OF STATUTES OF ADOPTION, and when it is required to be given and submitted, the court cannot take jurisdiction of the subject-matter without it.

UNDER OUR STATUTES, WHEN THE PARENTS ARE LIVING and do not belong to the excepted classes, such consent must be given, and is a prerequisite to jurisdiction.

THERE IS A MARKED DISTINCTION between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction, but jurisdiction does not attach until the conditions upon which it depends are fulfilled. Hence a decree rendered without jurisdiction does not estop any one, and may be collaterally assailed in any action.

APPEAL from Marion County.

STRAHAN, J.—This is an action of ejectment prosecuted by the plaintiff to recover certain real property situated in the county of Marion.

It appears from the findings that one D. W. Jones was the owner of the real property in controversy at the time of his death, and that he died intestate in said county of Marion; that one Emma G. Charlesworth was his only heir at law, unless the plaintiff was also an heir by virtue of a certain decree of the county court of Marion County, Oregon, by which said court allowed said D. W. Jones and the defendant herein to adopt the plaintiff, if said decree is valid; that prior to the commencement of this action, said Emma G. Charlesworth duly conveyed all her interest in said real property to the defendant, who thereby became the owner thereof, unless the plaintiff was entitled to inherit one half thereof by virtue of said decree of adoption; that prior to September 28, 1876, said Emma G. Charlesworth and Sylvester H. Jenner were husband and wife, and the plaintiff was born to them in lawful wedlock, and that on the twentieth day of September, 1876, said parties were by a decree of the district court of the twelfth judicial district in the state of California duly divorced, and the care and custody of the plaintiff was duly awarded to said Emma; that on April 2, 1877, said

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D. W. Jones and the defendant, his wife, made and signed a certain petition, which was presented to the county court of Marion County, Oregon, as follows:—

“To the Hon. John Peebles, county judge for the county of Marion and state of Oregon:—

“Your petitioners, D. W. Jones and Sarah A. Jones, his wife, of the city of Salem and state of Oregon, respectfully represent to your honorable court that they now have the care and custody of Mary Ellen Jenner, a female child of the age of ten years; that the parents of said child are Sylvester H. Jenner, now residing in San Francisco, California, and Emma G. Jenner, since divorced from said Sylvester H. Jenner and married to George Charlesworth; that in said decree of divorce the care and custody of said child was given to its mother, Emma G. Jenner, now Emma G. Charlesworth; that your petitioners desire to adopt the said Mary Ellen Jenner as their own child, and pray your honorable court for a decree making said child to all legal intents and purposes the child of petitioners, and that the name of said child be changed to Mary Ellen Jones.

(Signed)

“D. W. JONES.

“S. A. JONES.”

“STATE OF OREGON,)
COUNTY OF MARION.} ss.

“I, Emma G. Charlesworth, being duly sworn, say that I am the mother of Mary Ellen Jenner mentioned in the foregoing petition of D. W. Jones and wife; that I was divorced from Sylvester H. Jenner at San Francisco, on or about September 1, 1876, and that the court, in granting the divorce, awarded the care and custody of said child to its mother, deponent herein; that I hereby consent to the adoption of said child by said D. W. Jones and wife, and that the name of said child be changed to Mary Ellen Jones.

“EMMA G. CHARLESWORTH.

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"Subscribed and sworn to before me this nineteenth day of March, 1877.

[SEAL] "SETH R. HAMMER, Notary Public.

"Indorsed,—

"Ordered that the within application be granted, and that a decree be entered in accordance with the prayer of this petition and the law in such cases provided.

"April 2, 1877. J. C. PEEBLES, County Judge.

"Filed April 2, 1877.

"GEORGE A. EDES, County Clerk."

On the same day the following decree or order was entered in said matter by said county court:—

"Now at this day comes D. W. Jones and S. A. Jones, his wife, and present to this court their petition asking leave to adopt Mary Ellen Jenner, who is ten years of age, and to change her name to Mary Ellen Jones, and it satisfactorily appearing to the court that said Mary Ellen Jenner is the daughter of Sylvester H. Jenner and Emma G. Jenner, now Emma G. Charlesworth; that said Emma G. Jenner was divorced from said Sylvester H. Jenner in the state of California, and that Sylvester H. Jenner is still a widower of said state; that in the decree of divorce, as aforesaid, the care and custody of said Mary Ellen Jenner was awarded by the court to the mother, the said Emma G. Jenner, now Emma G. Charlesworth, and it further appearing that the written consent of the said Emma G. Jenner, now Emma G. Charlesworth, to the said adoption and change of name has been filed with the petition aforesaid to this court, and that the said D. W. Jones and Sarah A. Jones are of sufficient ability to bring up said child and to furnish her with sufficient care and attention and education, and that it is fit and proper and for the best interests of said child that said adoption should take place,— it is therefore ordered by the court that from and after

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this date the said Mary Ellen Jenner shall be to all intents and purposes the child of said petitioners, D. W. Jones and Sarah A. Jones, and that the name be changed to that of Mary Ellen Jones.

(Signed)

“JOHN C. PERBLES, Judge.”

It is further found by the court that the time of presentation of said petition and consent, and the rendition of said decree of adoption, the father of said plaintiff was living, but that no notice whatever was given to him of the filing of said petition or consent, or of said proceedings thereon, prior to the rendition of said decree, nor was any appearance for or on behalf of said Jenner ever entered in said county court in said proceeding, or in relation thereto; that about three years after the rendition of said decree, said plaintiff informed her father that she had been adopted by said D. W. Jones and his wife, the defendant herein, and her father approved thereof; that no one has ever appealed from the said decree of said county court; that after said decree was rendered, Jones and the defendant took charge of the plaintiff, and that she lived with them for about six years, and was during said time treated by Jones and wife as their child.

There were also other findings of fact, but they present no question of law for our consideration on this appeal.

The court found as conclusions of law: “1. That the decree of adoption mentioned in and set out in my sixth finding of fact was and is binding and conclusive upon Emma G. Charlesworth, and upon Sarah A. Jones, her successor in interest; 2. That the plaintiff is the owner and entitled to the possession of one undivided one half (subject to the defendant's dower interest therein) of the real property described in her complaint; 3. That the plaintiff is entitled to a judgment for the possession of said real property, and for one dollar damages, and for her

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costs and disbursements." From this judgment the defendant has appealed to this court.

1. The sole question to be determined is the validity of the decree of the county court of Marion County, allowing D. W. Jones and wife, the present defendants, to adopt the plaintiff as their child. If that decree is valid, then the judgment of the court below is right and ought to be affirmed; if otherwise, it must be reversed.

The act of adopting a child is not of common-law origin, but was taken from the civil law and introduced here by statute. The provisions on the subject, as found in several sections of Hill's Code, section 2937, provide who may adopt a child, residence of parties, and who must join in the petition, and in what court the petition is to be presented. Section 2938 says: "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of the child, or if there is no guardian the next of kin in this state, may give such consent; or if there is no next of kin, the court may appoint some suitable person to act in the proceedings as next friend of the child, and to give or withhold such consent."

By section 2939 the court is authorized to proceed as if a parent were dead, if such parent is insane, imprisoned in the state prison, under a sentence for a term not less than three years, or has willfully deserted and neglected to provide proper care and maintenance for the child for one year next preceding the time of filing the petition.

Section 2940 provides where a parent does not give consent to the adoption of a child, he is to be personally served with a copy of the petition and order thereon, if found in the state; if not, said petition is to be published once a week for three successive weeks in such newspaper printed in the county as the court directs, the last publi-

cation to be at least four weeks before the time appointed for the hearing.

- Section 2941 requires the consent of the child to such adoption, if he is of the age of fourteen years or upwards.

Section 2942 defines the duty of the court upon the hearing, and what facts must be made to appear, and the substance of the order to be made.

Section 2943 defines the effect of such adoption as to relationship and inheritance, and section 2944 deprives the parents of such child of all legal rights as respects the child, and frees him from all obligation of maintenance and obedience as respects his parents.

The question thus presented for our determination is a very important one, and lies in narrow limits. Its correct solution depends upon the single question whether or not the county court of Marion County, at the time it made the decree authorizing Jones and wife to adopt the plaintiff, had acquired the requisite jurisdiction over the parties for that purpose. To give its decree any force or effect, jurisdiction must have been acquired by the court (1) over the persons seeking to adopt the child, (2) over the child, and (3) over the parents of the child.

It may be assumed, I think, that enough is shown to give said court jurisdiction under subdivisions 1 and 2, and over Mrs. Emma G. Charlesworth, the mother of the child.

The sole question to be examined, therefore, is, whether enough is shown to give said court jurisdiction over the person of Sylvester H. Jenner, the child's father. But before proceeding to the consideration of this question, it may be well to advert to the principles of law to be applied in the determination of the question of jurisdiction. And in the examination of this question, we assume for the purposes of this case, but without deciding it, that under the constitution and laws of this state county

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courts, in the exercise of the powers conferred by this statute, are to be regarded as courts of general jurisdiction.

It appears that at the time the petition was presented to the county court, Sylvester H. Jenner was a non-resident of this state. In such case, and the record is silent, there can be no presumption that jurisdiction over his person was acquired.

Mr. Justice Field, in *Galpin v. Page*, 18 Wall. 350, states the rule applicable in such case: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

Further: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In the same case, and speaking more directly to the point now under consideration, the court quoted with approbation a decision of the supreme court of New Hampshire,—*Morse v. Presby*, 25 N. H. 382,—to the effect that a court of general jurisdiction may have special and summary powers, wholly derived from statutes not exercised according to the course of the common law, and which do not belong to it as a court of general juris-

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diction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. And after some other observations, the court adds: "But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court."

The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. This doctrine was fully approved by this court in *Northcutt v. Lemery*, 8 Or. 817, which renders its further discussion unnecessary.

Applying these tests to the record before us, and it is manifest that the court had no jurisdiction whatever over Sylvester H. Jenner at the time it rendered said decree of adoption. He was not served with notice and did not appear, and therefore the court was utterly without jurisdiction to render any decree or make any order which could in any manner affect his rights.

2. But counsel for plaintiff argue that this defendant is in no condition to make the objections of want of jurisdiction; that she consented to the act of adoption, and that she is bound by it. If this is so, it must be on the ground of estoppel. But estoppels to be binding must be mutual, and if Sylvester H. Jenner, who was a necessary party to this proceeding, was not bound by the decree, it is not perceived on what ground the same could be held binding on any of the other parties.

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But waiving this objection, I think the findings show that the attempted adoption was never consummated, because the statute under which the proceedings were had was never complied with. The statute requires the consent in writing of the parents, unless they are brought within its exceptions. Here only one parent consented, and there was no attempt made to bring him within the exceptions contained in the statute, and the petition was not served upon him. A question closely akin to this in principle came before the supreme court of Iowa, in *Tyle v. Reynolds*, 53 Iowa, 146, and the court said: "Therefore, a child by adoption cannot inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are that the written instrument must be executed, signed, and acknowledged, and *filed for record*; when this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption. The filing for record is just as important in a statutory sense as the execution or acknowledgment. One may be dispensed with as well as the other, for the right depends solely upon the statute. There is no room for construction, unless we eliminate words from the written law, and this we are not authorized to do." *Long v. Hewitt*, 44 Iowa, 262, and *Keegan v. Geraghty*, 101 Ill. 26, lay down, in effect, the same principle.

In the state of New Jersey a statute is in force very similar to ours, which came before the prerogative court of that state and received a construction in *Luppie v. Winans*, 37 N. J. Eq. 245. In that case the court said: "The child was under fourteen years of age, and the court, as appears by the opinion, construed the statute as requiring no consent, either on part of parent or child, to the adoption in such case, but held that in such cases the

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statute confides the whole matter to the discretion of the orphans' court without regard to the wishes of either parent or child. This construction is entirely inadmissible. It would make the law liable to be the instrument of the forcible transfer of one man's child to another person, in spite of the parent's opposition, provided the court deems it advantageous for the child that the transfer be made. The law expressly gives to the decree of adoption the effect of severing absolutely the legal ties between the parent and the child, and putting an end to their reciprocal relation. It declares that from the date of the decree, the rights, duties, and privileges, and relations between the child and the parent, except the right of inheritance, are severed, and transforms them all. . . . A just, and it seems to me an obvious and necessary, construction of our statute of adoption is, that if the child be under fourteen there need be no consent on its part, but the consent of the parent or parents, if there be any living, provided they be known and not hopelessly intemperate or insane and have not abandoned the child, must be obtained."

The same view seems to prevail in Pennsylvania under the statute of that state. The only case cited upon the argument from that state is *Booth v. Van Allan*, 7 Phila. 401; *Hurley v. O'Sullivan*, 137 Mass. 84. The court in passing upon the effect and construction of the statute said: "But there is one other objection which we think is fatal. The act of May 4, 1855, empowers the court to make a decree of adoption with the consent of the parents or surviving parent, or if there be none, of the next friend of an infant. The strict legal signification of the term 'parents' is the lawful father and mother of a child, but it may be questioned whether it does not mean more than this in the act of 1855,—whether the words ought not rather be taken to mean those who stand in the relation

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of father and mother to the infant. If this be the correct view, then the proceedings for leave to adopt the infant as hers are void for want of consent of parents. New Hampshire has a statute similar to ours, which came before the supreme court of Massachusetts in *Foster v. Waterman*, 124 Mass. 592. A child of persons resident in the state of Massachusetts had been adopted in the state of New Hampshire and the validity of said adoption was the question to be decided, and the court held that such a statute is not to be presumed to extend to a case in which the domicile of those petitioning for leave to adopt a child is in another state; the provision in the statute of New Hampshire, that the decree may be made in the county where the petitioner of the child resides, implies that the statute is intended to be limited to cases in which all parties have their domicile in that state."

3. It was claimed, however, that the adoption was complete as to the defendant, and the other persons who were in fact parties to the record. This construction was pressed upon the supreme court of Iowa in *Shearer v. Weaver*, 56 Iowa, 578, and rejected, the court saying: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way."

From these citations, and the plain import of the statute itself, it is manifest that the attempted adoption of the plaintiff by Jones and wife was never consummated, and that the plaintiff never acquired any rights to inherit Jones's property by reason of the facts found by the court.

The proceedings were fatally defective because the father of the child did not consent to the adoption nor was any notice of the application for such adoption served

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upon him, nor did he appear; and being a non-resident of the state, I am inclined to the opinion the statute did not apply to him. However that may be, the proceedings were fatally defective on the other grounds.

The court's second conclusion of law was therefore not justified by the facts found, and for that reason the judgment must be reversed and the cause remanded to the court below.

The other case between the same parties and submitted with this one, and involving the same questions, must also be reversed and remanded.

The conclusions reached render it unnecessary to order a new trial, because in no possible view of the facts would the plaintiff be entitled to recover.

PETITION FOR REHEARING.

[Filed March 12, 1893.]

LORD, J.—In this motion for rehearing the argument of counsel amounts to this: that the absence of consent of one of the parents, or to give the notice as prescribed by the statute if not found in the state, only renders the proceeding and decree of adoption voidable, but not void, and unless corrected on appeal, such decree cannot be collaterally assailed. This contention is necessarily based on the idea that the consent of both parents, if living and not belonging to the excepted classes, or notice as prescribed and already adverted to, is not a prerequisite to jurisdiction; that it is sufficient if the consent of one of the parents be obtained, and that the other parties, viz., the child and petitioning parents, are present and consenting to the proceeding for jurisdiction to attach, and thus to authorize the court to judicially act.

If this position be tenable, the decree of adoption is not void, and cannot be collaterally attacked, for it is elementary law that after jurisdiction has attached, although

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errors may occur in the exercise of such jurisdiction, the judgment rendered in such case is beyond the reach of collateral inquiry.

On the other hand, if the consent of both parents, or the consent of one and notice to the other as prescribed, whether in or out of the state, as the case may be, is necessary, and must precede the right or power of the court to act judicially, all other parties being present and consenting, such unity of consent, so to speak, is a prerequisite to jurisdiction, and a decree not founded upon it would be a mere nullity, binding no one, and subject to be so declared in a collateral action.

Our inquiry, then, is reduced to this: What are the requirements of our statute essential to confer jurisdiction upon the facts as presented in this record? It will assist us some in determining this question to ascertain the nature of the power conferred and the rule of construction in such case to be applied to the statute.

The permanent transfer of the natural rights of a parent was against the policy of the common law. The right of adoption, as conferred by this statute, was unknown to it, and repugnant to its principles. Such right was of civil-law origin, and derived its sanction from its code. The right of adoption, then, being in derogation of common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed. (*Brown v. Bacey*, 3 Dall. 365; *Dwarris on Statutes*, 257.) This being so, the statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with.

The statute provides that the parents of the child, except as therein provided, shall consent in writing to such adoption, but further provides that if a parent does not consent to the adoption of his child, the court shall order a

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copy of the petition and order therein to be served on him personally if found in the state, and if not, by publication as therein provided.

As the facts do not involve the excepted classes, the provisions of the statute in that regard are omitted. The object of such service, whether actual or constructive, when it has reference to those cases which require the written consent, and such written consent is not given, is to notify the party of the hearing in order to ascertain whether his consent may be obtained or will be given, so that the court may have the requisite authority to make the decree of adoption. If he appears and refuses to give such consent, there is then wanting what the statute specially names as essential to authorize the court to make a decree, or judicially act in the premises. The reason is, that consent lies at the foundation of statutes of adoption, and when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject-matter without it.

"The consent of the natural parents," says one writer, "and of the child if of sufficient understanding, are, except in cases where the parents have deserted their child, or are confined in prison, as a rule indispensable." (3 Cent. L. J. 398.)

Says another writer in annotating a case, the "adoption, except where it consists merely in declaring the person adopted an heir of the adopter, must be founded on consent. All the statutes require the written, and generally the recorded, consent of the adopting parent or parents, and of the *parents*, parent, guardian, next of kin, or next friend of the minor appointed by the court, in most states the consent of the minor, if over fourteen, and finally the consent of the court." (14 L. L. R. 682.)

And it is further remarked that the case annotated is valuable as an illustration of the strict construction that

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ought to be applied in deciding questions arising under statutes of adoption.

In *Luppie v. Winans*, 37 N. J. Eq. 245, the court say: "A just, and it seems to me an obvious and necessary, construction of our statute of adoption is, that if the child be under fourteen there need be no consent on its part, but the consent of the parent or parents, if there be any living, provided they be known and not hopelessly intemperate or insane and have not abandoned the child, must be obtained."

It is thus apparent that if the parents are living and do not belong to the excepted classes, that their consent must be obtained and is a prerequisite to jurisdiction; that without such consent jurisdiction does not attach, and the court is without authority to act and make a decree of adoption, and if it undertakes to do so, its decree will be a nullity, not voidable but void, and may be collaterally assailed in any action.

Now, by this record the admitted facts are, that the father of the plaintiff did not belong to the excepted classes, that he did not give his written consent, and that no notice in any form was given or attempted to be given him.

In such case the statute is explicit, and requires the consent of the parents in writing to sanction the authority of the court before it can make a decree of adoption; certainly, it could not proceed without notice at least, assuming that notice may be given in such cases, and a failure to appear would be equivalent to consent.

But in this case the contention is, that the court could exercise its jurisdiction without such consent, and that its decree would only be avoidable, and that those appearing, it not having been corrected upon appeal, would be estopped by it. The vice of this argument lies in assuming that jurisdiction attached, and the court was author-

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ized to make a decree of adoption without the consent which the statute prescribes as essential upon the facts as presented by this record.

There is a marked distinction between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction, but jurisdiction does not attach until the conditions upon which it depends are fulfilled.

In this case, the jurisdictional facts are the consent of the parents, not one of them but both, as the statute requires, and the absence of it is fatal to the validity of the decree. Hence, such a decree cannot bind or estop any one, and may be collaterally assailed, whenever and wherever it may be interposed in any action.

The motion is overruled.

[Filed December 20, 1888.]

N. LANGELL, APPELLANT, v. A. LANGELL, RESPONDENT.

PARTNERSHIP—SUIT TO DISSOLVE—PRIOR PARTNERSHIP—EVIDENCE OF—

ITS EFFECT.—In a suit by a partner to compel a copartner to account for partnership profits received by him, and the partnership has been of long standing, and was formed by written articles, the plaintiff will not be permitted to claim that prior to its formation another partnership had existed between the parties, and that the defendant retained the profits realized therefrom, and included them in the part of the capital stock which the articles of the subsequent partnership specified that he had invested therein, where said articles are silent as to any prior partnership, and as to any profit having been realized therefrom.

ARTICLES OF COPARTNERSHIP—CONTEMPORANEOUS PAROL AGREEMENT.—

Where N. L. and A. L., on the twenty-seventh day of February, 1869, entered into written articles of copartnership which specified that they had respectively invested certain amounts: *held*, that it was not competent for N. L. to prove a contemporaneous parol agreement between them, to the effect that the parties were to put into the copartnership the stock

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and profits of an alleged previous copartnership transaction, and that it constituted a part of the amount invested by A. L. And where the alleged previous partnership transaction of a government contract, taken in the name of J. L., the father of N. L. and A. L., who, long prior to the commencement of the suit, had died, and there was no memorandum or any date whatever showing what profits were realized therefrom beyond a mere conjecture, a court of equity will not attempt to take an account thereof.

PARTNER — DUTY TO ACCOUNT TO COPARTNER. — It is the duty of a partner to account to his copartner for all funds arising from the sale of partnership property, which come into his hands. And where the partner, instead of paying over to the copartner his share of such funds, invests them in other property, the latter is entitled to claim a share of the property proportionate to his interest in the partnership. But where partnership transactions are various and multiplied, and have been of long standing, and no account has been kept of them by which it can be ascertained in what property the funds have been invested, or to what extent investments thereof have been made, courts will not attempt to trace the complainant's share of the funds into other property, but adjust the matter upon the basis of the amount of funds received by the delinquent partner.

TRUST — A TRUST MUST BE PLEADED IN ORDER TO BE AVAILABLE. — In order to unite a claim to recover back an estate, or to have a trust therein declared, with a claim for an accounting, it must be pleaded as a separate cause of suit. Nor will the plaintiff be entitled to such character of relief where he has conveyed the estate by voluntary deed, unless it was procured to be made by fraud, or unless subsequent circumstances of such a nature have arisen as would render the retention of the property by the grantee unconscionable and fraudulent.

PLEADING — SUFFICIENCY OF. — Where the plaintiff alleged in his complaint that, for the purpose of enabling the defendant to sell certain described lands, in which he (plaintiff) had an undivided half-interest, he gave the defendant a deed to his interest therein, and for no other purpose or consideration: *held*, that the allegation was not sufficient to entitle him to a reconveyance; that his remedy in such a case would be upon the obligation of the defendant to sell the land and account for the proceeds; and that a promise to do so, and a refusal to comply therewith, would be material allegations in order to establish the liability.

APPEAL from the Circuit Court for the county of Jackson.

H. K. Hanna, for Appellant.

C. W. Kahler, E. B. Williams, and John Burnett, for Respondent.

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THAYER, C. J.—This appeal is from a decree in a suit brought by the appellant against the respondent, for an accounting as a copartner.

The appellant alleged in his complaint, that in 1867 he and the respondent entered into a partnership for the purpose of stock-raising, and such other business as might be connected with dealing in cattle; and that they had, since that time, carried on and conducted such business; that in 1867 the appellant obtained for the partnership a contract to furnish a large amount of beef to the government at Fort Klamath; that the partnership filled such contract, and realized a large profit therefrom,—the exact amount of which was unknown to appellant,—and that the respondent retained the whole thereof; that subsequently the partnership bought a large band of cattle and drove them out to Klamath County, where, by agreement, they were left in charge of respondent; that appellant contributed to the purchase of the cattle a large sum of his individual money; that in 1872 and 1873 appellant obtained for the partnership two other contracts with the government to furnish beef to the Indians at the Yainax reservation on Sprague River; that the partnership filled said contracts and realized large profits therefrom, all of which were retained by respondent; that said cattle increased in numbers, and the respondent each and every year sold a part thereof, and received large sums of money therefor,—the amounts of which were unknown to appellant,—all of which he retained, except the sum of fifteen hundred dollars paid for swamp-land purchased by the partnership; that in 1880, the respondent sold the greater portion of the partnership cattle, and realized therefrom the sum of \$8,234.50, all of which he retained; that the respondent from time to time, against the wishes of appellant, expended large sums of the partnership funds in buying and improving real estate, taking the title thereto

in his own name; that during said time the father of appellant and respondent died seised of a large body of land, situated in said county of Klamath, leaving them his only heirs at law; that appellant afterwards, for the purpose of enabling the respondent to sell said land, and for no other purpose or consideration, gave respondent a deed to it all; that respondent had since purchased a large band of horses and a quantity of valuable farming implements with the partnership funds, and refused to render any account thereof, or to pay appellant any portion of the same.

The respondent denied the partnership, denied any contract of partnership to furnish beef in 1867, or of the furnishing of any beef, or of the realizing of any profits, or of the retaining the amount realized from the contract, or that the partnership had any interest in it, and denied all the other material allegations in the complaint.

The respondent for a further answer alleged that on February 27, 1869, he and appellant entered into an agreement for a general partnership for five years; that each partner was to put into the business certain property, and that in contemplation of said partnership respondent, in the spring of 1869, purchased about one hundred and ninety head of stock,—cattle,—and took them to Langell Valley, and kept them there until the succeeding fall; that appellant failed and expressly declined to put into the partnership the property which he had agreed to, and voluntarily and with respondent's consent withdrew from it; that in the fall of 1869 respondent sold a portion of the cattle for twelve hundred dollars, and on the thirteenth day of December of that year he and the appellant had a full and final settlement; and that in consideration of one thousand dollars, which he then and there paid appellant, the latter sold and transferred to respondent all his interest in the remainder of said cattle, and that said part-

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nership agreement was then and there abandoned and annulled; and that no partnership had existed, nor any partnership business been done, since December 13, 1869.

The appellant, in reply to the new matter in the answer, denied all the material allegations thereof, except the length of duration of the partnership.

The case was heard in the circuit court upon depositions of witnesses and written proof, and a decree was entered therein dismissing the complaint, from which decree this appeal was taken.

It appears from the evidence in the case that the parties are brothers; that on the twenty-seventh day of February, 1869, they entered into the following agreement in writing under seal:—

“ARTICLES OF COPARTNERSHIP.

“Articles of agreement made and entered between N. Langell, of the one part, and Arthur Langell, of the other part, witnesseth as follows:—

“The said N. Langell and Arthur Langell have joined and by these presents do join themselves to be copartners together in all business in which they may be engaged in; and that the said partnership shall be known by the name of N. Langell and Brother; and said copartnership to continue for five years, unless per agreement it shall be sooner dissolved.

“N. LANGELL. [SEAL]

“ARTHUR LANGELL. [SEAL]

“Witness:—

“LOUIS SOLOMON.

“N. FISHER.”

Also, on the same date, entered into the further agreement as follows:—

“N. Langell and Brother has this day, February 27, 1869, entered into copartnership, and have invested the following amounts in said partnership: N. Langell has placed

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in said partnership \$1,725.75. This amount includes his residence adjoining P. P. Prim's residence on the north-east; also his town property fronting on California Street and joining David Lunn's brick building on the south. Arthur Langell has invested \$3,000 in said partnership.

"N. LANGELL.

"ARTHUR LANGELL."

It further appears that about the time of the execution of these agreements Arthur Langell engaged in buying up cattle, and that about the 1st of April, 1869, he had secured a band of one hundred and sixty head; that N. Langell assisted him in obtaining funds for that purpose; that the said parties then, in conjunction with one Isaac Woolen, who put with the band about sixty head of his own cattle, started with them for some point east of the Cascade Mountains in Klamath County, for the purposes of establishing a cattle ranch.

Mr. Woolen testified in regard to the matter as follows: "About the 1st of April, 1868, or 1869,—I cannot remember the exact date,—I had, prior to that time, made a contract with plaintiff and defendant to put in some cattle with their hand, to drive with them to some place east of the Cascade Mountains, Lake County, at that time. At that time Arthur Langell, the defendant, had a claim at Linkville, which claim is now owned by Quincy Brooks, as I understand. In pursuance of that arrangement, at the time above mentioned, they brought, that is, the plaintiff and defendant, about two hundred head of cattle to my place above mentioned, and staid at my house all night with the cattle. Plaintiff and defendant were both there with the cattle. I put into the band next morning about sixty head of cattle. Plaintiff and defendant and myself started next day with their cattle and mine to drive out to the Lake country."

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The witness, after describing their journey, which lasted many days, which also included a description of their various camping-places until they arrived at a creek called Yainax, which runs into Sprague River, testified: "That night we were visited by quite a number of Indians. They objected to our stopping there with the cattle, because we were on the reservation. We told them we were going about five miles farther, up to the springs. They claimed that the springs were also on the reservation. The question then arose what we had better do. Arthur Langell, the defendant, was in favor of going on. Nat Langell, the plaintiff, said 'all he had was in the cattle, and that he did not propose to take any chances.' I was in favor of going back, too. I did not want to take any chances. Plaintiff and myself being in the majority, we overruled Arthur, and we started back with the cattle, and drove back over the mountains, and let them stop on Alkali Lake, while we camped on Lost River, where the plaintiff and defendant and myself talked the matter over, and the next day, with our consent, Arthur Langell, the defendant, went up Lost River to look for a range for the cattle. I went with Arthur, and Nat Langell, the plaintiff, was left in charge of the cattle. We were gone two days. During our absence we found a proper place for the cattle, and we gathered up the cattle and took them up to the place selected by us. We all remained there about a week, fixing corrals and getting out material for other purposes."

In another part of his testimony, the witness stated: "I understood from plaintiff, Nat Langell, and the defendant, Arthur Langell, that they owned the cattle in partnership. I heard them both repeatedly so state; I also heard their father make the same statement in their presence. I heard Arthur Langell say several times that he and Nat Langell, the plaintiff, were full partners in the

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cattle. Heard Arthur Langell say so at the time we were driving the cattle out where we left them, and heard him say so several times afterwards up to the time I sold my cattle, which was about one year and a half afterwards."

This witness resided at Seattle, Washington Territory, at the time he gave his testimony, and it was taken there, under a commission issued out of the said circuit court. I refer to it particularly for the reason that the witness had a good opportunity to know the business relations existing between the parties, and he appears to be wholly indifferent in the matter.

A large amount of other testimony, bearing upon the question of copartnership between the parties that was taken, including the testimony of the parties themselves, was of the same character as that given by Mr. Woolen, but it does not have near the same weight. He had opportunities of knowing the fact, which none of the other witnesses, aside from the parties themselves, possessed; and but little reliance can be placed upon the testimony of the parties for the reason that it is conflicting.

I think, therefore, we must conclude that the parties, at least in the outset, were partners in the cattle. The written articles, it is true, do not specify in what business they intended to become partners, but provide that they join themselves to be copartners together in all business in which they may be engaged. This evidently refers to business engaged in by them jointly, whatever kind it might be; and their immediately engaging in the cattle business together would indicate the kind of business which the partnership was formed to carry on.

Counsel for the appellant claims that the parties were partners in the contract to supply beef to the government at Fort Klamath; that the appellant caused the bid therefor to be made in his father's name; and that it was left to his father nominally for the benefit of the appellant

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and respondent; that the respondent received the profits arising out of the contract and used them in the purchase of the cattle bought for the partnership, under the articles of February 27, 1869, and that they constituted the whole or a part of the three thousand dollars which the respondent invested in said partnership, as provided by said articles.

If we were to judge the matter from the situation of the respective parties, and the circumstances surrounding it, we should be inclined to believe that the appellant was an actor in that affair. The financial condition of the respondent at the time, the dependent condition of the father, and the position occupied by the appellant, together with the evidence regarding the transaction, furnished cogent proof that the latter secured the contract, and that it was fulfilled in the manner claimed by him. But if this were so, what *data* is there by which an accounting can now be enforced? The transaction occurred in 1867, there is no proof showing that any profits were realized from it; the father is dead, and the brother denies the appellant's right absolutely, and he has failed to preserve any memorandum by which they can be ascertained.

In his testimony in the case, he testified, in answer to the question as to whether he ever had any settlement with his brother or father, or had received anything from either of them, that he had not; that at the time the articles of partnership were drawn up, his brother had no books or accounts of the contract with him, and that they, — "we agreed to put the whole thing, whatever it might be, in the cattle we was about to buy. That is all I know about it."

In the same connection, however, he testified that he drew up the articles of agreement as his brother wished them, and inserted the amount of money he could put in himself; that his brother said he could raise three thou-

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sand dollars, and that he, appellant, inserted that amount in the articles of agreement. Here was an agreement deliberately made between the parties and signed by them, establishing relations of copartnership, and a very important affair existing between them, according to the claim of the appellant, left out, and now sought to be established by parol proof.

If the parties had agreed to put the proceeds of the beef contract into the cattle they were about to buy, as the appellant seeks now to establish after the lapse of many years, why was it not included in the writing? Courts cannot be expected to adjust matters between parties where they have dealt so loosely and carelessly with each other. As far as we are able to judge, the business relations between the parties commenced with the execution of the written articles referred to, and we must regard those articles as fixing the extent of their liability to each other.

The respondent, in denying the copartnership between him and the appellant, under the articles of February 27, 1869, attempted to sustain his denial upon two grounds: 1. That he never went into partnership with appellant, that the papers were drawn up to go into partnership when the appellant converted his house and town property into money, and furnished the same, together with \$225.75 which he then had on hand, to buy cattle; and that there was no partnership until the money was furnished, and that he had failed to furnish it; and in the fall of 1869 wrote the respondent a letter notifying him that he declined going into partnership; 2. That appellant, in consideration of one thousand dollars, sold all his right and interest in the cattle, and gave respondent a bill of sale of the same, dated Jacksonville, December 13, 1869.

In view of the first ground, the respondent in his testimony denied that the cattle were bought for the partner-

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ship, unless, as he stated it, the papers were complied with; denied that after the cattle were purchased and being removed to new Klamath County that he recognized his brother as a partner in them; stated that he had no recollection of telling Woolen anything about the cattle, only that they were his,—“my cattle.” And when inquired of how his brother came to go out with the cattle, whether as a hired man, made the following answer: “He just volunteered to go out with me and help me out with the cattle.” This ground of denial cannot be sustained by the evidence in the case, and circumstances attending the affair, and the respondent evidently was compelled to abandon it before he finished giving his testimony, as will be seen by his answer to the following cross-interrogatory put to him when on the stand, as a witness in his own behalf:—

“You may state whether or not, when you were taking the cattle out in 1869, and while you were out there, you told Mr. Woolen that you and Nat owned the cattle together or were partners in the cattle. Answer. I can’t recollect positive; I think we talked it over. My understanding at the time of going out with the cattle, and some time afterwards, was, that we were partners in the cattle.”

Besides, the papers contained no such conditions, as intimated by respondent, to be complied with.

The second ground is more tenable. The respondent produced a writing signed by the appellant, purporting to be a sale of his interest in the cattle; and he claims that it was executed upon a settlement between the parties of the appellant’s interest in them. The respondent testified upon the subject as follows:—

“I received a letter from him [appellant] along in the latter part of the summer or fall. In the letter he notified me that he had not sold his property, that he had put

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in those articles drawn by him, that he declined going into partnership. He wrote that he had a good home, and could make a living in his shop at his business. Should he sell out, and put it into cattle, he might lose them all by a hard winter, or the Indians might break out and get away with them all. He wanted me to come in, as he had borrowed some money from Mr. Beekman for me to buy cattle at Sterling, and wanted it settled up. I sold some cattle late in the fall, I think it was in December, 1869; I then came into Jacksonville and settled up with him.

“Question. Well, when you came in after selling those cattle, state what transpired between you and Nat in reference to the business. Answer. We settled up, took down the amount that was owing. As near as I can recollect, \$450 was due Mr. Beekman, \$220.75 was due my brother, and there was one or two other bills, I think, for hire of the horse that he rode out with the cattle, and his work going out helping me. I then paid him one thousand dollars, for which he sold all his right and interest in the band of cattle and two horses, which was all I had, and he gave me a bill of sale of the same.

“Question. Is this the bill of sale that he gave you at the time? Answer. Yes, sir; that is it.”

The following is a copy of the pretended bill of sale:—

[REV. STAMP.]

“JACKSONVILLE, Dec. 13, 1869.

“For and in consideration of the sum of one thousand dollars to me in hand paid, and this is the receipt of the same, I have this day sold all my right and interest in a certain band of cattle ranging at the head of Lost River, in the county of Jackson, state of Oregon, to Arthur Langell and Joseph Langell, who has said cattle in their possession.

“Dec. 13, 1869.

N. LANGELL.” [SEAL]

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The appellant testified, in answer to a question as to whether in the latter part of the summer or fore part of the fall of 1869 he wrote respondent that he had not sold his property put into the articles of copartnership, and that he declined going into the partnership, that he never wrote him any letter of that kind. He further testified thereto as follows: "I wrote him a letter. I think it was late in the fall of 1869. In that letter I told him I feared I was going to get into trouble about an article or articles which I had published; I think it was in the Oregonian; and as I did not wish to annoy him in the business we were then engaged in, I then offered to sell him my interest in the cattle. My offer was, that I would take a thousand dollars for my interest, over and above all indebtedness of the firm, including the note I owed Beekman, and keep my property here; that is to say, I was to come out of the business with a thousand dollars in cash. That was the contents of my letter to him."

The appellant, after stating to the effect that he received in reply to that letter one from the respondent, which had accidentally been burned up, testified regarding the contents of the letter to him from the respondent as follows: "He wrote me he would accept my terms if he had the money; that he had sold but few cattle that fall, owing to the fact that they were not fat; that after paying expenses and the debts, that he would have but little left. He then told me that if I thought myself in danger of getting into trouble, for me to send him a bill of sale, and that would protect him, at least out there."

In answer to a question asked the appellant as a witness on the stand, as to whether or not, in writing a second letter to the respondent, he inclosed with the letter a bill of sale of the cattle, he answered: "Yes, sir, I did. After I received his letter in relation to the bill of sale, I thought the matter over, and concluded to do so, the bill of sale

being only to be used as a protection to him in case of trouble. I concluded to insert my father's name as well as my brother's. I had implicit confidence in my brother at that time, and I knew that my father would not take any advantage of me in that respect. In a short time after,—say four or five weeks after I sent this bill of sale,—this trouble which I anticipated had blown over. I then wrote to my brother that the trouble had passed over, and for him to burn that bill of sale. The next time he came in he told me that the bill of sale was burned or destroyed."

The appellant also testified that the bill of sale introduced by his brother and filed as evidence was the same bill of sale, and that he never received the consideration mentioned therein, or any part of it, for his interest in the cattle. Here is a direct conflict between the statements of the parties as to an occurrence within the personal knowledge of each of them, and the court has no way of determining it except by determining which of the statements, in view of all the evidence and circumstances in the case, is the more probable.

The respondent has the bill of sale which the appellant confesses to have signed, and in the absence of certain features it exhibits, which will be hereafter referred to, I should regard it as decisive of the contention in the respondent's favor.

In a controversy of the character of the one involved in this case arising out of transactions of long standing, writings relating to them, executed by the parties or acted upon by them, are usually about the only proof that is reliable. In disputes between parties in regard to matters which involve pecuniary interests, their respective statements concerning the matters are so liable to conflict that it is very difficult, if not impossible, to ascertain the truth;

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and in the endeavor to arrive at it in such cases courts and juries must carefully weigh all the circumstances.

According to the testimony of the respondent, he received a letter from the appellant, notifying him that he, appellant, had not sold his property that he had put into the partnership, and that he declined going into it, giving his reasons therefor, and requesting respondent to come in, as he had borrowed some money from Mr. Beekman for respondent to buy cattle at Sterling, and he wanted it settled up; that he sold some cattle, went to Jacksonville, and settled up with appellant; that they took down the amount due Mr. Beekman, \$450, the amount due appellant, the \$220.75 he had advanced for respondent, one or two other bills, he thought for the hire of the horse that appellant rode out with the cattle, and appellant's work in going out and helping respondent on that occasion. The whole affair, according to respondent's testimony, only consisted in the appellant's exercising his option not to go into the partnership, and the payment to him by the respondent of the amount of liabilities the latter had incurred, and for his work in assisting respondent in driving the cattle out to the range. The appellant claimed no interest in the cattle, nor did the respondent concede that he had any. Yet, the latter says: "I then paid him, appellant, one thousand dollars, for which he sold all his right and interest in the band of cattle and two horses, which was all I had, and he gave me a bill of sale of the same."

It is unnecessary to add that the respondent's account of the affair, as testified to by him, involves a marked incongruity. There is also another phase of it tending to render it absurd. The bill of sale, as may be seen by referring to it, was not to Arthur Langell, but to Arthur Langell and Joseph Langell, the father. Now, in view of the respondent's testimony, what explanation can be

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offered for inserting or allowing to be inserted Joseph Langell's name in the bill of sale as a joint purchaser of the cattle? The circumstance is wholly inconsistent with the testimony of the respondent, and entirely consistent with that of the appellant regarding the affair. Besides, a large number of witnesses in the case testify to acts done and declarations made by the parties long after the date of the alleged bill of sale, tending to show that they still continued to be partners in the cattle as before. I do not see how, in the light of the evidence, the conclusion that the parties were partners in the cattle can be avoided. The respondent, it is true, had the main conduct of the business. The appellant was not present assisting in its immediate operations; the proof shows that he was only on the ground a few times; but it discloses that he always took a lively and active interest in the affair. He bought and shipped supplies to the respondent, procured loans of money used in the business, and it is evident that he was mainly instrumental in obtaining the contracts with the government to furnish beef to the Indians at the Yainax reservation in 1872 and 1873, which we may infer from the evidence were profitable. There seems, however, not to have been any account of the partnership transactions kept by the parties or either of them, nor acts done by them which would constitute the basis for an accounting. The cattle seem to have been kept together in a band long after the period of duration of the copartnership, as provided in the articles, had expired. It is alleged in the complaint that the respondent in 1880 sold the greater part of them, and realized the sum of \$8,234.50 therefor, all of which was retained by him. This allegation is not denied in the answer, except by denial of the sale of partnership cattle, and a realization of said sum therefor, or any sum. The denial, as I view it, merely denies the partnership.

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The appellant also alleged in his complaint that the respondent from time to time, against his wishes, expended large sums of the partnership funds in buying and improving real estate; taking the title thereto in his own name; and that he had since purchased a large band of horses, and a lot of valuable farming implements, with said partnership funds; and that he refused to render any account of the partnership funds or property, or pay appellant any portion thereof.

It is the duty of the respondent to account for this partnership property, and the appellant is entitled to claim a one-half interest in the net funds arising therefrom. He is also entitled to claim his share in any property in which the respondent is shown to have invested said funds. We think, however, that as the transactions have been of so long standing, and no account having been kept of them, it would be futile now to attempt to trace the appellant's share of the funds into other property, or to ascertain with mathematical accuracy the amount he is justly entitled to; his negligence in that respect has lost to him rights which he might otherwise have been enabled to enforce. He has an excuse for his laxity in the particulars referred to, on account of the relationship existing between him and the respondent; but that can only serve as a palliative to himself; it will not answer the behests of the law, which exacts vigilance and promptness as much in such a case as in any other. The respondent, no doubt, sold more or less of the cattle out of the band every year, and may have invested a part of the proceeds therefrom in the lands he now possesses; but at the same time he paid the expenses of the business, and fifteen hundred dollars for the appellant's share of the swamp-land, which the latter had the benefit of; besides, he gave his entire time and attention to the business, and endured all the hardships and privations which

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it imposed. I think, therefore, that the proceeds of the sale of the cattle in 1880, the \$8,234.50, should be regarded as the only assets of the partnership in which the appellant has an interest, aside from the real property specified in the said articles; and that the \$3,000 acknowledged in the articles to have been put into the concern by the respondent, and the \$220.75 cash put in by the appellant, should be deducted therefrom, and the appellant be entitled to one half the remainder, and the said \$220.75, aggregating \$2,727.62½, with interest thereon from the first day of January, 1881, at the rate of eight per cent per annum, and that the said property of the appellant should be relieved from any claim or charge on account of the copartnership.

The claim of the appellant to recover back the interest in his father's estate, which he conveyed to the respondent, or to have a trust declared in his favor in the premises conveyed, could not be considered in the suit herein, without being pleaded as a separate cause of suit. Nor am I able, in fact, to discover how the appellant can be entitled to any relief on account of that transaction. The deed was voluntarily made, and unless the appellant can establish fraud in its inception, or by matters *ex post facto*, he is not entitled to any such relief. Where a deed is executed to effectuate a particular purpose, which, in consequence of the happening of some unforeseen event, cannot be consummated, and the grantee notwithstanding insists upon retaining the property conveyed, it would be an unconscionable and fraudulent act upon his part, and a court of equity would doubtless compel a reconveyance to the grantor. But a conveyance to a grantee to sell the land would stand upon a different footing. There the remedy of the grantor in case of the refusal to make the sale would be upon the obligation, which would be a promise to sell the property and account for the proceeds.

Points decided.

And whether or not it could be enforced in a court of equity may be doubted. At all events, the party would not be entitled to relief without alleging the promise and refusal, neither of which the appellant alleged in this case.

We are of the opinion that the appellant is entitled to a decree herein, for the sum of \$2,727.62½, with interest from the first day of January, 1881, at the rate of eight per cent per annum; that his said property mentioned in said articles be relieved from any claim or charge on account of the copartnership, and that neither party be entitled to costs; but that each be required to pay one half of the fees of the clerk of this court upon the appeal.

[Filed January 15, 1889.]

JOHN PATTERSON, RESPONDENT, v. CLELL HAYDEN, APPELLANT.

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SEDUCTION — PREVIOUS UNCHASTITY — REFORMATION. — A woman may be unchaste, and then reform and lead a virtuous life, and if she is then seduced, her seduction ought to be visited with such damages as a jury would think, under all the circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation.

SEDUCTION DEFINED. — The word "seduction," when applied to the conduct of a man toward a woman, means the use of some influence, artifice, promise, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces: *therefore, held*, that criminal indulgence with a woman who was at the time leading a lewd and lascivious life does not constitute seduction.

EFFECT OF EVIDENCE — PROVINCE OF THE JURY. — It is the right of the jury, and not of the court, to determine the effect of evidence, unless in particular cases where its effect is declared by law.

APPEAL from Marion County.

G. H. Burnett and E. A. Downing, for Respondent.

N. B. Knight and McCain & Hurley, for Appellant.

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STRAHAN, J.—This is an action brought by the plaintiff against the defendant to recover damages for the seduction of his minor daughter. The plaintiff had judgment in the court below for the sum of \$3,633, from which the defendant has appealed to this court. The only questions presented for our consideration on this appeal are the alleged errors of the court in giving and refusing instructions. The appellant's counsel excepted severally to one instruction given by the court, and to its refusal to give those asked on behalf of the defendant.

The defendant gave evidence tending to prove that for a long time prior to the alleged seduction, and continuing up to that event, the plaintiff's daughter resided with her parents in the city of Salem; that she was in the habit of meeting several young men of her acquaintance, including the defendant, out in the streets and avenues of the city in the night-time, and alone; that these meetings were as late as nine and ten o'clock, or later; that on these occasions the parties did not go to the house of plaintiff's parents for her, but that she came out to meet them.

The testimony of Stella Patterson tended to prove that the first sexual intercourse between herself and the defendant took place on the 4th of July, and according to Dr. Holmes's evidence, when Stella applied to him for treatment in the month of August following she was afflicted with chronic gonorrhea.

The charges excepted to and two of the requests are so closely connected that they will be considered together. The portion of the charge excepted to constitutes a part only of an entire sentence in the charge of the court. The complete sentence is as follows: "Evidence of prior unchastity of the plaintiff's daughter is competent both to show that the sexual intercourse was without enticement, artifice, persuasion, or solicitation which overcame her

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reluctance and scruples, and also in mitigation of damages." And then comes the part excepted to: "But proof of former unchastity is of itself not a defense or bar to any action of this kind."

The following are two of the defendant's requests to charge:—

"1. Before you can find a verdict for the defendant in this case, you must first find from the evidence that the plaintiff's daughter was at and prior to the alleged seduction a chaste female, and that the defendant seduced her, and had illegal sexual intercourse with her."

"5. Proof that the defendant and plaintiff's daughter had illicit sexual intercourse with each other does not of itself show that the plaintiff's daughter was seduced by the defendant; but before you can find such seduction, you must first find from the evidence that the plaintiff's daughter was chaste, and that she was overcome by the defendant by the use of some artifice or promise, which by reason of her relations with and confidence in the defendant she, although a moral and chaste female, could not resist."

1. Under the particular facts disclosed by this record, that part of the charge of the court which was excepted to had a tendency to mislead the jury. They might have well understood from that language that no difference to what extent or how often the plaintiff's daughter may have engaged in acts of lewdness and lasciviousness with miscellaneous men, and continuing up to the very event complained of, still her seduction by the defendant was possible, and the jury could only consider such acts in mitigation or to corroborate the defendant's denial. This, I think, for reasons presently to be noticed, was going too far. There is no doubt that a woman may be guilty of unchastity, and then reform and lead a virtuous life. In such case, her seduction ought to be visited with such

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damages as a jury would think, in view of all the facts and circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation. In other words, the female must have honestly abandoned and ceased her lewd conduct for a sufficient length of time before the act complained of, as to induce the jury, as reasonable men, to believe the reformation was real, and not feigned. If the court had added to the charge a proviso to the effect that for a reasonable time before the alleged seduction the plaintiff's daughter had abandoned and ceased her unchastity, if she had been unchaste, so as to satisfy the jury, at the time of the alleged seduction, she was leading a virtuous life, such instruction would have left the jury free to have instituted the necessary inquiry on that subject.

2. By the two requests which were refused, counsel for appellant seek to present the question whether or not a woman who is without virtue and unchaste can be the subject of seduction within the meaning of the code. The action for the injury and wrong done to a father, mother, or guardian by the seduction of a daughter or ward is given by Hill's Code, section 35, as follows:—

"Sec. 35. A father, or in case of death or desertion of his family, the mother, may maintain an action as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service."

This section has entirely changed the character of the action. Under the law as it stood formerly, loss of service was the gist of the action, without which it could not be sustained. The value of the services rendered was immaterial, but some service, or a legal duty to render the same, must have been alleged and proven, and then the

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jury was directed to assess damages for the loss of such service as well as for the dishonor brought upon the plaintiff's family by reason of the seduction of his daughter, etc.; but the damages in fact were assessed for the seduction.

This anomalous state of the law was sought to be remedied by the section above quoted, so that there need be now no loss of service by the parent or guardian, or liability to render service by the daughter or ward. Special damages, such as expenses incurred for medical treatment and the like, are still recoverable, but they must be specially alleged in the complaint.

But the question which presents the greatest difficulty is, What is meant by the word "seduction" in this section? Lexicographers are not agreed as to its meaning. Webster defines the word "seduce": "To draw aside from the path of rectitude and duty in a manner; to entice to evil; to lead astray; to tempt and lead to iniquity; to corrupt; to deprave; to *induce to surrender chastity*." And the word "seduction" thus: "The act of seducing or of enticing from the path of duty; specifically, the *act or crime of persuading a female to surrender her chastity*." Burrill's Law Dictionary thus defines it: "The debauching of a woman; the offense of inducing a woman to consent to unlawful intercourse,"—omitting altogether the elements of chastity.

Under Webster's definition, the female must have been persuaded to surrender *her chastity*; under Burrill's, only to consent to *unlawful intercourse*.

Courts have been more inclined to follow Webster's definition than those given by the legal lexicographers.

In *Croghan v. State*, 22 Wis. 444, the word "seduction" is thus defined: "The word 'seduction,' when applied to the conduct of a man toward a female, is generally understood to mean the use of some influence, promise, arts, or means

on his part by which he induces the woman to surrender her *chastity* and *virtue* to his embraces."

So this court in *Parker v. Monteith*, 7 Or. 277, approved of the following definition of "seduction": "A promise of marriage by the defendant to Flora Parker, or any influence exerted by him over her, such as gaining her affections, or acquiring influence over her, or persuading her, which had a tendency to *draw her from the path of virtue*, would be sufficient, if followed by illicit intercourse, to constitute seduction, if the jury believe that she was thereby constrained to yield to his desire."

And this court, in *Breen v. Henkle*, 14 Or. 494, construing section 36, Hill's Code, which gives a right of action to a female who is unmarried and over twenty-one years of age, and who has been seduced, said: "The section of the statute which gives the right of action only provides that the plaintiff may recover such damages as may be assessed in her favor. I suppose this should be construed to mean legitimate damages, and the case being *sui generis*, it leaves a wide scope for construction. If the section intends that such woman in any case of illicit sexual intercourse resulting in pregnancy can maintain an action against her paramour, the recovery should be confined to the actual pecuniary loss sustained. Such a rule would not be unjust to the man in any case. It would only be a fair apportionment of a burden arising from a mutual wrong. If, however, it is intended to include in all cases the loss of character and reputation of the woman, and the damages be estimated by a jury of men, it would operate oppressively and perniciously. It would tend to the demoralization of the female sex; would be a reward for unchastity, which a class of adventuresses would be swift to profit by. If, on the other hand, the said section intends to enable an unfortunate woman, whose love and confidence have been gained, and her consent to the

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and in the endeavor to arrive at it in such cases courts and juries must carefully weigh all the circumstances.

According to the testimony of the respondent, he received a letter from the appellant, notifying him that he, appellant, had not sold his property that he had put into the partnership, and that he declined going into it, giving his reasons therefor, and requesting respondent to come in, as he had borrowed some money from Mr. Beekman for respondent to buy cattle at Sterling, and he wanted it settled up; that he sold some cattle, went to Jacksonville, and settled up with appellant; that they took down the amount due Mr. Beekman, \$450, the amount due appellant, the \$220.75 he had advanced for respondent, one or two other bills, he thought for the hire of the horse that appellant rode out with the cattle, and appellant's work in going out and helping respondent on that occasion. The whole affair, according to respondent's testimony, only consisted in the appellant's exercising his option not to go into the partnership, and the payment to him by the respondent of the amount of liabilities the latter had incurred, and for his work in assisting respondent in driving the cattle out to the range. The appellant claimed no interest in the cattle, nor did the respondent concede that he had any. Yet, the latter says: "I then paid him, appellant, one thousand dollars, for which he sold all his right and interest in the band of cattle and two horses, which was all I had, and he gave me a bill of sale of the same."

It is unnecessary to add that the respondent's account of the affair, as testified to by him, involves a marked incongruity. There is also another phase of it tending to render it absurd. The bill of sale, as may be seen by referring to it, was not to Arthur Langell, but to Arthur Langell and Joseph Langell, the father. Now, in view of the respondent's testimony, what explanation can be

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offered for inserting or allowing to be inserted Joseph Langell's name in the bill of sale as a joint purchaser of the cattle? The circumstance is wholly inconsistent with the testimony of the respondent, and entirely consistent with that of the appellant regarding the affair. Besides, a large number of witnesses in the case testify to acts done and declarations made by the parties long after the date of the alleged bill of sale, tending to show that they still continued to be partners in the cattle as before. I do not see how, in the light of the evidence, the conclusion that the parties were partners in the cattle can be avoided. The respondent, it is true, had the main conduct of the business. The appellant was not present assisting in its immediate operations; the proof shows that he was only on the ground a few times; but it discloses that he always took a lively and active interest in the affair. He bought and shipped supplies to the respondent, procured loans of money used in the business, and it is evident that he was mainly instrumental in obtaining the contracts with the government to furnish beef to the Indians at the Yainax reservation in 1872 and 1873, which we may infer from the evidence were profitable. There seems, however, not to have been any account of the partnership transactions kept by the parties or either of them, nor acts done by them which would constitute the basis for an accounting. The cattle seem to have been kept together in a band long after the period of duration of the copartnership, as provided in the articles, had expired. It is alleged in the complaint that the respondent in 1880 sold the greater part of them, and realized the sum of \$8,234.50 therefor, all of which was retained by him. This allegation is not denied in the answer, except by denial of the sale of partnership cattle, and a realization of said sum therefor, or any sum. The denial, as I view it, merely denies the partnership.

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corroborate the defendant, where he denies the seduction, but also in mitigation of damages. (*Hogan v. Cregan*, 6 Rob. (N. Y.) 138; *Shattuck v. Myers*, 13 Ind. 46; *White v. Murtland*, 71 Ill. 250; *Drish v. Davenport*, 2 Stew. 266.)

But these authorities leave the main question untouched, which counsel for appellant seek to present on this appeal, and that is, What is the legal effect of lewd practices and habits of the female alleged to have been seduced at and immediately before such alleged seduction? Do they only mitigate the damages, and corroborate the defendant's denial of the seduction? or do they go further, and defeat the plaintiff's right of recovery entirely, if the jury are satisfied that the female alleged to have been seduced was in the habit of seeking opportunities for criminal indulgence, not only with the defendant, but with various other persons, about the time of such alleged seduction? In other words, can a woman who engages in criminal indulgence with her male acquaintances as opportunities present themselves, and who will make opportunities for that purpose, be said to be seduced within the true intent and meaning of the statute? Is such a woman drawn aside from the path of virtue and overreached by the artifice, deception, and cunning of the seducer? Unless these questions can be answered in the affirmative, it is not perceived that she was "seduced." To hold otherwise would be to break down all distinctions between the virtuous and vicious, and to place the common bawd on the same plane with the virtuous woman whose life was pure, and whose confidence had been betrayed by the heartless libertine.

Instruction No. 5, while it is subject to some verbal criticism, contained a correct legal proposition, as applied to the facts of this case, and the same ought to have been given to the jury.

No. 1 was misleading and properly refused, for the

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reason that it required the jury to find "that the plaintiff's daughter was at and prior to the alleged seduction a chaste female," etc. At some period of her life prior to the alleged seduction she may have been unchaste and then reformed. But this instruction would allow no reformation. It has already been shown that this is not the law.

3. The defendant's counsel asked one other instruction, as follows: "The fact that the plaintiff's daughter was suffering at the time of her alleged seduction with a venereal disease, if you find such fact to exist, would, if not explained, in itself be sufficient evidence of unchastity to prevent a recovery in this action." This instruction was properly refused, for the reason that it invades the province of the jury. It is the right of the jury, and not the court, to determine the effect of evidence, unless in particular cases where its effect is declared by the code.

It follows from what has been said that the judgment must be reversed, and the cause remanded for a new trial.

[Filed January 15, 1889.]

**LUCY A. ADAMS, APPELLANT, v. CALVIN H. ADAMS
AND WILLIAM ADAMS, RESPONDENTS.**

STATUTE OF FRAUDS — AGREEMENT — PART PERFORMANCE OF — WHAT IS. —

The marriage alone of parties is not such a partial performance of an agreement made between them regarding pecuniary rights as will be sufficient to take it out of the operation of the statute, which requires such agreements to be in writing.

CONTRACT — SPECIFIC PERFORMANCE OF MARRIAGE SETTLEMENT. — A court of equity will not decree a specific performance of an oral agreement to make a marriage settlement, unless the party to be charged has given countenance to the doing of acts by the adverse party, upon the faith of the agreement, of such a nature that the latter would be materially injured if the agreement were not carried out. In such a case, the court, in order to avoid a fraudulent use being made of the statute, will enforce a specific performance of the agreement.

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MARRIAGE CONTRACT — INDUCEMENTS TO MAKE REPRESENTATIONS CONCERNING PROPERTY. — Where W. A., in proposing marriage with L. A., held out inducements that he was able to support her; that he expected to keep control of certain premises owned by him during his lifetime, and have them for a home, and that she should share them with him, and in case she survived him, should have the use and control of them during her lifetime, and after their marriage the parties occupied the premises as a home, the said W. A. assuring the said L. A. that it was their home: *held*, that the facts did not prove an agreement upon the part of W. A. to give to L. A. the use of the property for her home during her life, in consideration of her marrying W. A.; that such an agreement, if not in writing in some form, would be void by the statute of frauds, and that the said facts did not show a sufficient partial performance of the agreement to take it out of the operation of the statute.

ID. — COSTS OF LITIGATION — DISCRETION OF COURT OVER IN EQUITY CASES. — *Held, further*, W. A. having, in about two years from the time of the marriage, sold the premises to his brother, C. H. A., evidently for the purpose of ejecting L. A. therefrom, that L. A. had no standing in court to impeach the transaction as fraudulent in a suit to enforce a specific performance of the alleged agreement; but the court, having authority to direct as to the payment of costs in suits, will, where the conduct of a party has been shown to be unjust and oppressive, require him to pay the costs of the litigation.

APPEAL from the Circuit Court for the county of Marion.

George H. Burnett, for Appellant.

Seth R. Hammer and *W. M. Kaiser*, for Respondents.

THAYER, C. J. — This appeal is from a decree of the said circuit court in a suit in which the appellant was plaintiff and the respondents were defendants. The litigation originated out of an action at law brought in said circuit court by the respondent Calvin H. Adams against the appellant, to recover the possession of lot 2, in block 19, in the city of Salem. After the action was commenced, the appellant, conceiving that she had no legal defense thereto, but that she was entitled to relief arising out of facts requiring the interposition of a court of equity, filed a cross-complaint against the respondents, in which she alleged, in substance, that the respondents were brothers;

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that about June 1, 1884, the respondent William Adams, being then the owner of the premises in dispute, entered into an agreement with appellant to give her the use of the property for her home during her life, in consideration of her marrying him; that she did marry him, and with his consent entered into possession of the property under the agreement, and remained there; that about two years afterwards, for the purposes of defrauding appellant, William Adams made a deed of the property to his brother, said Calvin H. Adams, without appellant's knowledge or consent; that said Calvin took the deed with full knowledge of William's fraudulent purposes, and of appellant's rights in and to the possession of the property, with intent to aid said William in perpetrating the fraud on appellant, and without having paid any consideration for the property; and that respondents' doings, and the claims of said Calvin of ownership of the property, and that he is entitled to the immediate possession thereof, constitute a cloud upon appellant's right in said property and of her possession thereof; and wherein she prayed that the said respondents be perpetually enjoined from claiming or asserting any estate or interest in the property adverse to appellant's use of the same during her life, and from disturbing her possession thereof. The respondents, after interposing a demurrer, which was overruled by the court, filed an answer denying all the material allegations of the complaint. The case was thereafter heard upon depositions and proofs, and the said court decreed that the said complaint be dismissed, which is the decree appealed from.

It appears from the evidence that the appellant and the said William Adams intermarried in this state on the first day of June, 1884; that at the time of their marriage she was above fifty-two years of age, and that he was more than sixty-two years old; that she had had a former husband, and he a former wife; that they had a slight

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acquaintance in Illinois while they were single persons, but did not see each other again until they met in Oregon, a short time before their marriage. Their object in forming the relation was evidently a purely selfish one; that is apparent from the account of their courtship, although it is glossed over with sentimentality. She doubtless fancied that she would thereby secure a home and the ordinary comforts of life; while he confidently imagined that she would be a great assistance to him in enabling him to prosecute the many vagaries which seem to have occupied his attention.

He says in his testimony: "I thought she was capable of being a very useful woman, an ornament and blessing to society, and that her taste and ingenuity would indeed make me, with my own efforts, a beautiful home."

She says in her testimony: "At our first interview in Portland, he told me that he had sold his property at Hillsborough, and had bought the property here in Salem; that, through the request of his former wife, he had willed the property to the Bible Society, but he expected to keep control of it during his lifetime, and if he ever married again, he expected to have it for a home, and his wife would share it with him, and if she survived him, she should have the use of it and control of it during her lifetime. In our next interview, he made a proposition of marriage, and wanted I should make him a beautiful home, as his former wife had done, and repeated again that he expected that we should have it for a home, and repeated again that I should have it for a home in case I outlived him, only far more strongly than on the former occasion, and laid a great deal of stress on 'making us a beautiful home.' . . . I complained of being prematurely broken, and he said he was abundantly able to support me; that his brother owed him some, — I forget the amount, — and some others; and he had a standing offer of sixty dollars a month, be-

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sides a good standing in three of the learned professions; and that he had an invention, that if he were successful in he believed it would make us wealthy."

The appellant should not have been deceived by such assurances; for she ought to have known that a man of the age of the said respondent, who claimed to have a good standing in three of the learned professions, who was then trying to succeed in an invention, and had nothing but an ordinary house and lot in Salem, which he had willed to the Bible Society, as evidence of his thrift, would not be able to support a wife nor furnish her a comfortable home. It is apparent, however, that she was deceived, and married him under a delusion. And the evidence shows quite conclusively that the sale of the house and lot by William Adams to the respondent Calvin H. Adams was a mere pretext and device to dispossess the appellant thereof.

It appears from the evidence that William wrote a letter to Calvin H., as follows:—

"SALEM, OREGON, Aug. 11, 1886.

"CALVIN H. ADAMS, Hillsborough, Oregon.

"*My dear Brother*,—Being anxious about what I owe you, and feeling the uncertainty of life and strength in my old age, I propose, if you can send me three dollars by money order or registered letter, for and in consideration of the same to give you a warranty deed of my home, numbered 191 High Street, and my lot, No. 2, in block 19, both in the city of Salem, Marion County, Oregon.

Affectionately your brether,

"WILLIAM ADAMS."

Said William was asked, when on the stand as witness in the case, the following questions, to which he gave the following answers:—

"What was the three dollars for that you mention in

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that letter? A. As the necessary consideration to insure its validity.

"Was it not for the purpose of making and recording the deed? A. It was not.

"How much did you owe your brother at that time? A. Well, summing up from the time I had owed him, counting interest, I estimated at one thousand dollars.

"Was it for borrowed money? if so, how much? A. Some two hundred dollars of borrowed money.

"When did you borrow it? A. Some of it as long ago as 1847 or 1848, when I was attending medical college.

"What else did you owe him for? A. For assistance in coming to this country, in 1852.

"How much did that amount to? A. About \$150 or more, with interest.

"Did you intend this deed as a revocation of the will that you made to the Bible Society? A. Of course, if I put it out of my power, it would revoke it.

"Did your brother ever make any demand on you for the payment of this money that you claim to owe him? A. We had talked of it, and he had claimed it, and I had admitted his claim.

"When was this? A. The first when we arrived in this country, in 1852.

"When did you deliver the deed to your brother? A. I delivered it to his agent soon after it was made.

"Who was his agent? A. Seth R. Hammer.

"Did you not consult Mr. Hammer about this business, —about conveying this property to your brother? and did you not arrange with him to act as your brother's agent in the matter? A. I recommended him to my brother as a proper person to act as his agent.

"Is it not a fact that the only communication your brother had with Mr. Hammer on the subject up to the time of the execution of the deed was had through you,

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and you acted as your brother's agent in getting Mr. Hammer to attend to the matter? A. I think it is not.

"Did you interview Mr. Hammer on the subject in the absence of your brother? A. I did.

"Did you do all this without consulting your brother? A. Yes.

"Did you make the deed before you received an answer to your letter of August 11, 1886, addressed to your brother? A. I did not."

The witness further stated that his brother knew that witness was having trouble with his wife at the time the deed was made, and that the appellant claimed the premises as her home.

This evidence shows conclusively to my mind that the transaction of the conveyance of the lot from William Adams to Calvin H. was a mere subterfuge, and that it was done in order to eject the appellant from the premises. The whole affair was evidently a scheme of cunning and hypocrisy, invented for the purpose of ousting the appellant from the home which it was clearly understood she was to have and enjoy during her lifetime,—the house on the premises where she was taken after the marriage, and was told by her husband, as she testified, "We have got home now; this is our home," and told her "to kneel down and thank her heavenly Father for a home." In view of this evidence, the conduct of William Adams towards the appellant is, to say the least, unkind and ungenerous. Such faithlessness illy accords with the sentiments of honor, justice, and charity as entertained by the broad-breasted man of sin, however it may be regarded by pious moralists and religious zealots. But, notwithstanding, the case must be determined in accordance with principles of jurisprudence; the merits of the controversy have to be considered from a legal standpoint, and however much the court may be inclined

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to condemn dissimulation and cruelty, it has no alternative except to administer the inflexible rules of the law. The statute provides that "an agreement made upon consideration of marriage other than mutual promise to marry is void, unless the same or some note or memorandum thereof expressing the consideration is in writing," etc. (Code, sec. 785, subd. 4.)

The agreement alleged in the complaint, that the respondent William Adams agreed with the appellant to give her the use of the premises for her home during her life in consideration of her marrying him, rests in parol; and if proved as alleged, I do not see how, in view of the statute, we could hold that it was valid. The appellant's counsel contends that it was sufficiently performed to take the case out of the statute; but no performance is shown, aside from the fact that the parties actually intermarried, and cohabited as husband and wife, and that of itself is not sufficient.

We are not authorized to construe the statute as though it read in effect that an agreement made in consideration of marriage is void, unless the same is in writing, or *unless the parties actually consummate the marriage*. It was not intended to mean that; but was intended to mean that all antenuptial agreements concerning settlements, advances, and other pecuniary matters, made upon consideration of marriage, should be reduced to writing in some form, in order to prevent frauds and perjuries. A party has a right to interpose the statute as a defense in all such cases, unless he has given countenance to the performance of acts by the adverse party upon the faith of the agreement of such a nature that the latter would be materially injured if the agreement were not carried out. In the latter case, a court of equity, to avoid a fraudulent use being made of the statute, will enforce the performance of the agreement. But acts done prior

to the contract, acts merely preparatory or ancillary to the agreement, such as delivering abstracts of title, measuring the land, drawing up deeds, etc., marriage alone, payment of the price in whole or in part, do not constitute a part performance within the doctrine. (Pomeroy's Eq. Jur., sec. 1409, note 1.)

The appellant has not made any showing entitling her to the relief prayed for in her complaint. Her husband no doubt gave her to understand that he would furnish her a house and support her; he probably pictured to her, in glowing colors, a beautiful Eden, in which they would dwell and enjoy a continuous fruition of felicity; but the promised paradise proved to be the premises where the parties, after their marriage, took up their abode, and, after leading a cat-and-dog life for a couple of years, the said William, in order to eject the appellant therefrom, sold for three dollars, and the payment of some ancient debts, amounting, with thirty-five or forty years' interest added, according to his estimate, to about one thousand dollars, which, "feeling the uncertainty of life and strength in his old age," he became suddenly conscientious about paying. But that the parties entered into an agreement whereby the said William agreed to give the appellant the use of the premises for her home during her life, in consideration of her marrying him, is hardly sustained by the testimony. Nor is it shown that any such agreement was sufficiently performed to take the case out of the statute. She did nothing that I can discover, aside from the marrying, except to go and live upon the premises as William Adams's wife. The property was not set apart to her as a home, nor any intention shown to devote it to such use. Nor was William Adams guilty of any such fraud as would justify the enforcement of a specific performance of such an agreement. The course he pursued in making a sham sale of the premises in

Points decided.

order to evict his wife therefrom was vindictive and mean. The action to dispossess her was evidently instituted by his direction and for his benefit; and while she has no standing in court to question the transaction, yet I think he should be required to pay all the costs of the litigation. His attempt to turn his wife into the street, without food, raiment, or shelter, except such as she could provide for herself, very poorly comports with that vow he took at the marriage altar, before the same heavenly Father whom he told her to kneel down and thank for the beautiful home he is now nefariously scheming to expel her from.

The appellant's complaint herein will be dismissed upon the payment by the respondent of the costs as above suggested.

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[Filed January 15, 1899.]

CHARLES E. DUNHAM, RESPONDENT, v. G. SHINDLER & CO., APPELLANTS.

TRANSITORY ACTIONS — JURISDICTION. — All actions not required to be commenced and tried in the county in which the subject of the action or some part thereof is situated, or which are not for a penalty or forfeiture imposed by statute, or are not against a public officer or person appointed to execute his duties for an act done by him in virtue of his office, etc., must be commenced in the county in which the defendants or either of them reside or may be found at the commencement of the action, and the court will not acquire jurisdiction over the person of the defendant unless so commenced.

PARTNERSHIP — HOW IMPEADED. — A partnership cannot be sued as such. The names of its members must be set out in the complaint and summons, and a service upon a person not named therein, although certified by the sheriff in his return to be a member of the partnership, is a nullity.

APPEAL from the Circuit Court for the county of Wasco.

Atwater & Storey, for Respondent.

Williams & Williams, for Appellants.

Opinion of the Court.

By the COURT.—This appeal is from a judgment rendered in form by the clerk of said circuit court in vacation. The respondent filed in the office of the said clerk a complaint against the appellants, designating them as G. Shindler & Co., defendants. He thereupon issued a summons directed to G. Shindler & Co. as defendants. The summons was in the usual form, requiring the defendants to appear and answer the complaint in the action within ten days from the date of the service of the summons upon them, if served within Wasco County, or if served within any other county of the state, then within twenty days. The summons, it appears, was sent to the sheriff of the county of Multnomah for service, who returned the same with a certificate thereon indorsed and signed by him, which is to the effect that he served it within said county of Multnomah on the sixteenth day of April, 1888, on the said G. Shindler & Co., by delivering a copy thereof prepared and certified to by him as sheriff, together with a copy of the complaint prepared and certified by George H. Thompson, clerk of Wasco County, to D. W. Shindler, a member of the firm of G. Shindler & Co. Subsequently, on motion of the respondent's counsel to enter default and judgment, the said clerk proceeded and entered a judgment in favor of the respondent and against G. Shindler & Co. in the said circuit court for the sum of \$268.07, to draw interest at the rate of ten per cent per annum, besides \$30 as attorneys' fees, and \$21 costs and disbursements.

The complaint in the action was upon an alleged agreement of the appellants to pay respondent two promissory notes and interest, executed to the respondent by D. W. and E. L. Crop. The action was a transitory one, and was required by the code to be commenced and tried in the county in which the defendants or either of them resided or might be found at the commencement of the

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action; or if none of the parties resided in the state, the same could be tried in any county which the plaintiff might designate in the complaint. It was not an action in which the summons could be served in any other county than that in which the venue was laid, and the respondent's attorneys should have so understood it. Such a course of procedure is trifling with the administration of justice, and cannot be tolerated. The only object to be gained by such practices is to harass and annoy parties. Any one who reads the code must know that such an action as the one attempted to be commenced herein has to be brought against a defendant where he resides or is found. To send a summons into another county for service, unless the action is local, is contrary to the practice and precedents in this state which have existed for the last twenty-five years, and members of the bar have no excuse for being ignorant upon that subject.

The judgment appealed from is fatally erroneous upon another ground: a partnership cannot be sued as such; the names of its members must be set out in the complaint and summons. That is an old and well-established rule. The respondent could not give the court jurisdiction of the person by having service of the summons made upon a party not named therein, except in the case of substituted service. G. Shindler & Co. were not served by the service upon D. W. Shindler. The sheriff certifying in his return that the latter was a member of said company was no evidence that he was so. It was not the province of the sheriff to find out who the members of the firm of G. Shindler & Co. were. It was his business to serve the persons named defendants in the summons. It is to be hoped that such a course as the one which has been pursued in this case will not again be attempted; it is discreditable to the profession.

The judgment will be reversed.

 Points decided.

[Filed January 15, 1889.]

MAY DAVIS, RESPONDENT, v. S. P. SLADDEN, AP-
PELLANT.

17	259
94	434
21*	140
33*	813
17	259
47	516

SPECIAL DAMAGE — SLANDER — ACTIONABLE WORDS. — At common law, there was no redress for defamatory words, unless they imputed a crime, or related to a man's profession or trade, or caused some special damage.

SPECIAL DAMAGES — WHEN MUST BE ALLEGED AND PROVEN. — Words spoken of a female charging her with adultery or fornication or incontinence in any form were not actionable unless special damage ensued, which were required to be alleged and proved.

SLANDER — ACTION FOR AT COMMON LAW. — Defamation was a subject of spiritual censures, the remedy for common bad language being in the ecclesiastical courts; and the fact that it was so explains the reason of the rule as it exists at common law.

ECCLESIASTICAL COURTS — JURISDICTION OF. — Adultery being a spiritual offense, cognizable only in the ecclesiastical courts, and the punishment being confined to the infliction of penance *pro salute anime*, it resulted, to avoid punishing a party twice for the same words, that to charge a married woman with adultery was not actionable *per se*, and that no redress could be obtained therefor at common law, without special damage is shown.

STATUTE LAW — EFFECT OF IN ACTIONS FOR SLANDER. — And this is the rule applied to the several states in which the common law prevails, where such offenses as adultery and fornication have not been made indictable by statute.

WORDS ACTIONABLE PER SE. — Words, then, are actionable in themselves only where an offense is imputed by them for which the party is liable to indictment and punishment, either at common law or by the statute.

ID. — IMPUTING ADULTERY TO MARRIED WOMAN. — To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery, and as under our criminal code adultery is indictable and punishable, such words charge a crime, and are actionable *per se*.

[ON REHEARING. — FILED MARCH 14, 1889.]

SLANDER — REPETITION — JUSTIFICATION. — Slandorous words cannot be justified by proof that the defendant only repeated what he heard another person say concerning the plaintiff.

APPEAL from Lane County.

S. W. Condon, George A. Dorris, and J. K. Weatherford,
for Respondent.

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C. B. Bellinger, L. Bilyeu, and Washburn & Woodcock,
for Appellant.

LORD, J.—This is an action for slander. The complaint alleges that the defendant, in the presence and hearing of L. B. Rossman and other persons, falsely and maliciously spoke of and concerning plaintiff as follows: "Fenton sent those two prostitutes to talk with my wife" (meaning this plaintiff and her mother). And at the same time and place, as follows: "Do you think more of the little fee you will get out of these low, disreputable people [meaning the plaintiff] than you do of the friendship of my wife." And as follows: "If you bring my wife into court against this prostitute [meaning the plaintiff], she nor none of our family will ever speak to you again"; and "my wife would not have that prostitute on her land [meaning by 'that prostitute' the plaintiff], not for any money. All the neighbors are complaining about it now. You reside in that neighborhood yourself, and cannot afford to have such people there." That, at the time of uttering said words by the defendant, the plaintiff was and now is a married woman, and has a husband living, and has ever borne a good name and character above reproach, etc.

The complaint does not allege special damages resulting from the speaking of the words by the defendant, and the only question raised is: Are the words charged actionable *per se*?

The distinction early taken in the law between words actionable and words not actionable in themselves is, that in the former the law adjudges them to be injuries, though no special loss can be proved, while in the latter, in addition to the words, it was necessary for the plaintiff to allege and prove special damages. The more difficult and vexed question, however, has been to determine what words were actionable *per se*.

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It was said by Spence, J., that "there is not, perhaps, upon any subject so much uncertainty in the law as when words shall be in themselves actionable." (*Brooker v. Coffin*, 5 Johns. 192.) And it may have been for some such reason that Holt, C. J., more than a century before, was led to say that "it was not worth while to be learned on the subject."

At common law, there was no redress for defamatory words, unless they imputed a crime, or related to a man's trade or profession, or caused some special damages. It mattered not that the words spoken involved an attack on personal character, or how gross the immorality or moral delinquency imputed by them, unless they charged a crime, such words were only actionable when special damage ensued. The rule as laid down by Starkie is, that "no charge upon the plaintiff, however foul, will be actionable, unless it be an offense punishable in a temporal court of criminal jurisdiction." (1 Starkie on Slander, 21.) Except when applied to a person in his calling or the conduct of his business, as to say of a man he is a "cheat" or a "swindler" (*Chase v. Whitlock*, 3 Hill, 138; *Wererbach v. Trone*, 2 Watts & S. 408; *Osborne v. Bacon*, 6 Cush. 185), or a "damned rogue" (*Oakley v. Farrington*, 1 Johns. Cas. 129; *Caldwell v. Abbey*, Hardin, 529), or a "scoundrel" or "blackleg" (*Tassel v. Capron*, 1 Denio, 250; *Stevenson v. Hayden*, 2 Mass. 409; *Ford v. Johnson*, 21 Ga. 399; *Artietta v. Artietta*, 15 La. Ann. 48), is not actionable. "Nor were words imputing to a female adultery or fornication, or a want of chastity in any form, actionable, unless special damage ensues and is shown. (*Gascoigne v. Ambler*, 2 Ld. Raym. 1004; *Graves v. Blanchard*, 2 Salk. 695; 5 Hurl. & N. 534; *Wilby v. Elston*, 65 Eng. Com. L. 141; *Brooker v. Coffin*, 5 Johns. 188; *Breys v. Gillespie*, 2 Johns. 115; *Stout v. Wood*, 1 Blackf. 71; *Elliott v. Adesbury*, 2 Bibb, 473; *Beach v. Rauney*, 2 Hill, 309;

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Woodbury v. Thompson, 3 N. H. 194; 1 Starkie on Slander, 166; Townsend on Slander and Libel, sec. 172.)

Except in London and some other particular places, it is the settled law of England that to charge a woman with incontinence or adultery is not actionable at common law, unless special damage is alleged and proved. So discreditable was the state of the law in that country in making it so difficult for a female to obtain redress for slanders on her moral character, that Lord Brougham was induced to say: "I may lament the unsatisfactory state of our law, according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin is not actionable without proof that it has actually produced special temporal damage to her; but I am here only to declare the law." (*Lynch v. Knight*, 9 H. L. 592.) The reason of this principle is ascribed to the fact that originally the remedy for common bad language was in the ecclesiastical courts.

Defamation was a common subject for spiritual censures, and Mr. Justice Stephen says: "And the fact that it was so explains the rule of the common law that no action lies for words spoken, unless they impute a crime or relate to a man's profession or trade, or cause special damage." (2 Stephen's History of the Criminal Law of England, 409.)

In *Palmer v. Thorpe*, 2 Coke, part 4, p. 20, it is said: "Touching defamations determinable in the ecclesiastical court, it was resolved that such defamations ought to have three incidents: 1. That it concerns matters merely spiritual and determinable in the ecclesiastical court, as for calling him "heretic, schismatic, adulterer, fornicator," etc.

The application of this principle is well illustrated in *Byron v. Eames*, 12 Mod. 106, in an action on the case for

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saying a woman had a bastard, etc., where it was moved in arrest of judgment that the words are not actionable, because they are of spiritual connusance, and no temporal loss accrues, and the court say: "These words are most scandalous of a young woman, so that were it *res nova* perhaps an action would lie; but there are many authorities to the contrary. It is a crime of which the ecclesiastical court has connusance; and it is not reasonable that the party should be liable to defamation and an action too." As a consequence, to avoid punishing a party twice for the same words, the temporal courts held that such words were not actionable *per se*.

Adultery, then, being a spiritual offense, cognizable only in the ecclesiastical courts, and the punishment being confined to the infliction of penance *pro salute animæ*, it resulted that to charge a married woman with adultery was not actionable *per se*, and that no redress could be obtained therefor at common law, without special damage ensues, which must be alleged and proved. And this is the law, with few exceptions, in the several states in which the common law prevails in this country, where such offenses as adultery and fornication have not been made indictable by statute. It must, then, be the law in this state, unless, by force of legislative sanction, the words alleged impute a crime involving moral turpitude.

Tested, therefore, by the common law, the words alleged are not actionable *per se*, and as no special damage is alleged, no case is stated. But as the offense of adultery is now made by our criminal code an indictable felony, a punishable offense involving moral turpitude, the inquiry now is, Do the words spoken and alleged necessarily and by reasonable intendment charge the defendant with the crime of adultery? For if they do, the words are actionable *per se*, and a case is stated, though

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no special damage is alleged. By reference to the complaint, it will be seen that the word forming the gist of the action is the word "prostitute" several times repeated and applied to the plaintiff. If the word "prostitute," as thus applied to the plaintiff, implies the crime of adultery, then the word is actionable *per se*, and no special damage need to be shown in order to maintain the action. What, then, are the acts or practices of a female which constitute her a prostitute? Undoubtedly, as ordinarily understood and applied by mankind, they are such acts or practices as consist in common lewdness of the female or in an indiscriminate intercourse with men for hire. A prostitute, therefore, is a female given to promiscuous sexual intercourse for the sake of gain. This is the definition of the books.

Said Appleton, C. J.: "A prostitute is a female given to indiscriminate lewdness for gain; it is the practice of a female offering her body to an indiscriminate intercourse with men." (*State v. Stoyall*, 54 Me. 27; *Carpenter v. People*, 3 Barb. 603; *Commonwealth v. Cook*, 12 Met. 93; *State v. Ruble*, 8 Iowa, 453; *Osborn v. State*, 52 Ind. 528; *Fanhestock v. State*, 102 Ind. 163; *Sheeley v. Cokley*, 43 Iowa, 185.)

When, then, the word "prostitute" is applied to a woman, it is meant that she is given to the practice of offering her body to promiscuous intercourse with men for gain. Adultery may be committed by one act of illicit intercourse, but the female to whom the word "prostitute" can be applied has only gained that character by a long continuance in the vice of lewdness. It necessarily denotes one who, if married, has committed numerous adulteries, and, under our code, rendered herself liable to indictment and criminal punishment.

As a married woman, the plaintiff could not be a prostitute without having committed repeated adulteries.

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Such is the direct and legal consequences of the illicit acts which make up the character of a prostitute when the woman is married. To say of a married woman that she is a "prostitute" is necessarily to impute to her the guilt of adultery, and as under our law adultery is indictable and punishable, such words charge a crime and are actionable *per se*. Such has been the holding in the several states which have statutes making adultery a punishable offense, and the decisions have gone on the ground that such charge, if true, rendered her liable to punishment under such statutes.

In *Klewin v. Bauman*, 53 Wis. 244, it was held that words accusing a married woman of being a prostitute are actionable *per se*. So in *Rancher v. Goodrich*, 17 Miss. 82, words accusing a married woman with being a whore were held actionable *per se*. (See also *Sheehey v. Cokley*, 43 Iowa, 185; *Pledger v. Hathcock*, 1 Ga. 551.) In short, where adultery or fornication is made indictable by statute, words imputing that a person has been guilty of such an offense are actionable in themselves. (*Stiber v. Wynal*, 19 Mo. 513; *Miller v. Parrish*, 8 Pick. 385; *Truman v. Taylor*, 4 Iowa, 424; *Baudership v. Roe*, 23 Pa. St. 82; *Buford v. Wible*, 32 Pa. St. 95; *Spencer v. McMasters*, 16 Ill. 405; *Moberly v. Preston*, 8 Mo. 462; *Nelson v. Barnett*, 45 Ind. 163; *Symmonds v. Carter*, 32 N. H. 458; *Strobet v. Whitney*, 31 Minn. 384; *Klewin v. Bauman*, 53 Wis. 244; Odgers on Libel and Slander, 84, and note.) It is no longer the rule that the words alleged to be slanderous are to be construed *in mitiori sensu*, but they are to be taken in their ordinary sense, as they would naturally be understood by those to whom they were addressed.

If the words fairly import the charge of a crime, and would be so understood by mankind, the injury is inflicted on the character of the plaintiff as completely and fully as if the crime had been imputed. (*Woodworth v. Mead-*

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ows, 5 East, 463; *Walton v. Singleton*, 7 Serg. & R. 450; *Demarest v. Haring*, 6 Cow. 76; *Duncan v. Brown*, 15 B. Mon. 136; *Dixon v. Stewart*, 33 Iowa, 125; *Butterfield v. Buffon*, 9 N. H. 156; *Hancock v. Stephens*, 11 Humph. 507.)

“If you bring my wife into court against *this prostitute* [meaning the plaintiff], she nor none of our family will ever speak to you again”; “My wife would not have *that prostitute* on her land, not for any money”; “All the neighbors are complaining about it; you reside in that neighborhood yourself, and cannot afford to have such people there,” etc;—the plain and obvious import of this language was to impute to the plaintiff the guilt of repeated adultery. No one could hear such language uttered without understanding from it that the defendant intended to charge the plaintiff with promiscuous or illicit intercourse with men for gain. Indeed, according to its natural import, such was the activity and notoriety with which the plaintiff was plying the lewd and indiscriminate practices of the prostitute that “all the neighbors were talking about it.” No phraseology could have been used which would have conveyed to the mind more plainly or explicitly her want of chastity, and her guilt of adultery, if the words used were true, as before stated.

Words are actionable in themselves, either at common law or by the statute, where an offense is imputed by them for which the party is liable to indictment and punishment. In this state the breach of chastity, whether by adultery or lewd cohabitation, is punishable by statute (Code, secs. 1858, 1862); and as the words used impute a crime involving moral turpitude, and punishable by the statute, they are actionable *per se*, and special damage need not be alleged to maintain the action.

It may be true, as suggested by counsel, that the case presents some harsh features, but we must apply the law

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as we find it, or make a bad precedent, because the case is a hard one. As to the other error alleged upon which the appeal is based, the argument did not indicate much reliance was placed in it, the instructions asked seems inconsistent with the language charged and found to be true. However, if counsel desire it, we will hear further argument upon that point. But as the case now stands, we must affirm the judgment.

PETITION FOR REHEARING.

[Filed March 14, 1889.]

STRAHAN, J.—A doubt was suggested by the court when this case was first argued, whether or not the words charged in the complaint were actionable *per se*, and counsel on both sides devoted their time to the consideration of that question. A conclusion was reached adverse to the appellant on that question. The opinion failed to notice some instructions asked by the appellant upon the trial in the court below, which were refused, and exceptions duly taken. On his application a rehearing was allowed for the purpose of enabling the court to further examine those exceptions. The instructions which were refused are as follows:—

“5. If you find from the evidence that the slanderous words alleged in plaintiff’s complaint to have been spoken by defendant were first spoken in substance by witness George A. Dorris, to the defendant, and that what Sladden said, if he said anything at all, was said only to Dorris, and in repetition only of what Dorris had said, and that Sladden did not claim to know, and did not know, the character or reputation of plaintiff, but that Dorris did claim to know her reputation, then there would be no slander on the part of Sladden.

“6. If you find from the evidence that the person to whom the words in the complaint are alleged to have

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been addressed first assailed the character of plaintiff, and pretended to know what her character was, and that whatever words were used by defendant concerning the character of plaintiff were a repetition in substance of what said person had related to defendant concerning the character of plaintiff, and that whatever words were used by defendant concerning the character of plaintiff were used upon the condition that said person was relating the truth concerning the character of said plaintiff, then there was no slander used by this defendant, and your verdict must be for the defendant."

It may be doubted whether or not there was any evidence before the jury that would have justified the giving of these instructions under any view of the law. The defendant himself testified that Mr. Dorris did not say they were prostitutes; the word "prostitute" was not used during the entire conversation. It is true that in another part of his evidence the defendant says that all he said on the occasion in question which referred to the plaintiff was only repetitions of what Mr. Dorris had said to him. But waiving this question, and assuming that there was some evidence before the jury which tended to prove that what the defendant said at the time was a repetition of the slanderous language used by Mr. Dorris, and the question is presented whether or not such repetition was justifiable. In other words, does the fact that it was a repetition entirely exempt and excuse the person who repeats it from all personal responsibility? *Lord Northampton's Case*, 12 Coke, 134, decided in the star-chamber in 1613, seems to give some sanction to the appellant's claim; but that case has not been generally followed, neither in England nor in this country. More than that, the book containing it is one of questionable authority. (Odgers on Libel and Slander, 162, 163.)

But it is believed that the very decided weight of

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authority in this country is that any person who publishes a slander concerning another is responsible for his act, notwithstanding the words published may be mere repetitions of what the speaker had heard some other person say. (*Fowler v. Chichester*, 26 Ohio St. 9; *Kennedy v. McLaughlin*, 5 Gray, 3; *Stevens v. Hartwell*, 11 Met. 542; *Inmann v. Foster*, 8 Wend. 602; *Treat v. Browning*, 4 Conn. 408; *Sans v. Joerries*, 14 Wis. 722; *State v. Buttmann*, 15 La. Ann. 166; *Evans v. Smith*, 5 T. B. Mon. 364; *Fitzgerald v. Stewart*, 53 Pa. St. 343; *Wolcott v. Hall*, 6 Mass. 513; *Alderman v. French*, 1 Pick. 1; *Bodwell v. Swan*, 3 Pick. 376; *Watson v. Buck*, 5 Cow. 499; *Root v. King*, 7 Cow. 613; *Cole v. Perry*, 8 Cow. 213; *Mapes v. Weeks*, 4 Wend. 659; *Sheahan v. Collins*, 20 Ill. 325; *Dame v. Kennedy*, 21 N. H. 318; *Smith v. Buckeker*, 4 Rawle, 294; *Freeman v. Price*, 2 Bailey, 115; *Townsend on Slander*, secs. 114, 210, and note 3.)

These authorities conclusively show that one who repeats a slander cannot be exonerated on that ground, and therefore it would have been error for the court to have given the instructions asked by the defendant.

A number of authorities hold that the fact may be shown in mitigation of damages. (*Hinkle v. Davenport*, 38 Iowa, 355; *Fowler v. Gilbert*, 38 Mich. 292; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178; *Parker v. McQuam*, 8 B. Mon. 16; *Williams v. Greenwade*, 3 Dana, 432.)

But the instructions asked did not present that question, and we are therefore precluded from considering it. In reaching this conclusion, the court has been guided solely by the law, and here properly our duty ends; but we cannot forbear saying that there were some facts and circumstances connected with the case which ought to have entitled the defendant possibly to a more lenient consideration at the hands of the jury than he appears to have received, prominent amongst which is the fact

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that he did not seek the interview in which the slanderous language is alleged to have been used, and the peculiar circumstances under which that interview occurred, and which ought somewhat to have mitigated the damages. But we are powerless to interfere only for error in law occurring at the trial, and the circumstances adverted to, being entirely matters of fact, were exclusively for the jury, and we cannot interfere.

The judgment of the court must therefore be affirmed.

[Filed January 15, 1890.]

THOMAS MONTEITH, APPELLANT, v. T. E. HOGG,
RESPONDENT.

ASSIGNMENT BY DEBTOR — EFFECT OF ON LEGAL TITLE OF ASSIGNEE TO PROPERTY. — An assignment whereby a debtor conveys all his property for the benefit of his creditors amounts to a complete cession or surrender of his property to his creditors. It operates to vest in the assignee the legal title to the property, but the beneficial interest is in the *cestui que trust* for the creditors. He is seised for them, not for himself, and the moment he is seised the substantial interest passes out of him to them.

ID. — RESULTING TRUST AS TO THE RESIDUE OR PROCEEDS. — After the assignment the assignor has no legal or equitable rights in the assigned property until the purposes of the trust are satisfied, when a trust results in his favor in the residue, if any there should be, of the unappropriated property or its proceeds.

ASSIGNOR — EFFECT OF HIS CONTRACTS ON THE ASSIGNED PROPERTY. — Until the debts are paid and the trust fully performed, the assignor has no interest, legal or equitable, upon which to base a contract in the assigned property, and consequently, any contract made in relation thereto is without validity, and cannot be enforced.

APPEAL from the Circuit Court for the county of Linn.

J. C. Powell and *J. R. N. Blackburn*, for Appellant.

J. W. Whalley, *W. R. Bilyeu*, and *Wolverton & Irvine*, for Respondent.

LORD, J.—This is a suit in equity originating in a cross-bill to an action of ejectment, to which a demurrer was sustained, and a decree rendered therein, from which this appeal is brought.

Sufficient facts to understand the question raised are these: The plaintiff being indebted on four promissory notes, with one D. B. Monteith as surety, to secure him mortgaged the real property included in this suit. Subsequently D. B. Monteith foreclosed the mortgage, but prior to the sale by the sheriff, the plaintiff and the said Monteith made an agreement to the effect that he was to bid in the property for the amount of the mortgage, which was alleged to have been less than the value of the property, and to hold the same in trust for him, and not to sell any part of it without his consent, and to make payment of his indebtedness in the order stipulated therein, etc.; but at the date of said agreement and the sheriff's sale of said property R. S. Strahan was the assignee in insolvency of the estate of plaintiff, etc. The defendant purchased the same from the said D. B. Monteith.

From this statement it will be seen that at the time of the assignment of his property by the plaintiff to the said Strahan, under the insolvent act, the property involved in this suit was mortgaged to the said D. B. Monteith, and that the agreement alleged to have been made in respect to it was made after the foreclosure proceedings were instituted, but before the sale.

The question involved and to be decided is, Had the plaintiff any such interest in the real property in dispute at the time as authorized or enabled him to make any valid contract, or any contract in respect thereto? Under the insolvent act, by his deed of assignment he conveyed all his property, real and personal, to his assignee, R. S. Strahan, to hold in trust for the payment of the debts to his creditors. The property in dispute being

then mortgaged, his assignee, standing in his shoes, took it subject to the payment of such mortgage. Nor is this controverted, the counsel for the plaintiff candidly admitting, unless his client retained some certain present right of an equitable nature in the property assigned, no case was stated. The real controversy then is as to the effect of a deed of assignment upon the assigned property. All other matters discussed were incidental to and subordinate to this point.

An assignment whereby the debtor conveys all his property for the benefit of his creditors amounts to a complete cession or surrender of his property to his creditors. It operates to vest in the assignee the legal title to the property, but the beneficial interest is in the creditors, the *cestuis que trust*. He is seised not for himself, but for the creditors, and as a consequence, the moment he is seised, the beneficial, substantial interest passes out of him into them. Necessarily the converse of this proposition must be true as to the assignor's interest in the property assigned. After the assignment he is divested of the legal title to the property assigned, and the only possible interest he can have is wholly uncertain and contingent, and according to the nature of the transaction only results after the payment of the debts, and is confined to such residuum as may remain of the unappropriated property or its proceeds. In a word, until the purposes of the trust are satisfied, the assignor has no legal or equitable rights in the assigned property.

"An assignment," says Mr. Burrell, "is an absolute conveyance, by which both the legal and the equitable estate is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors, and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds." (Burrell on Assignments, sec. 4.)

Again, the same writer says: "It operates to divest the debtor of his entire estate and interest in the property assigned, so that he cannot convey or encumber it by mortgage as against the creditor, and he retains nothing except the equitable and incidental right to discharge the trusts of payment of the debts before sale, and thus entitle himself to a reconveyance of the whole estate, or to claim a reconveyance of the residue remaining unsold after the debts are discharged, or payment of the residue of the proceeds of the sales." (Burrell on Assignments, sec. 298.)

The assignment divests the assignor of his entire estate and interest, and is an absolute appropriation of the property to the payment of the debts.

Said Cooley, J., in *Rodman v. Nathan*, 45 Mich. 609: "The assignor had no lien on the property assigned, and neither did he have any special property therein. The assignee was general owner until the trust had been fully performed. When the trust was discharged, the assignor would become entitled to have any surplus restored to him, not because of any special property, but because the resulting trust then restored to him his former rights as general owner." It results, then, that an assignment conveys the entire estate, legal and equitable, to the assignee, and that the assignor has no right, legal or equitable, in the assigned property until the purposes of the trust are satisfied. Apply these principles to the facts presented by this record, and the plaintiff is without any right or interest, legal or equitable, upon which to base a claim to the land in suit, and consequently he can make no binding contract in relation thereto.

Necessarily, then, the alleged contract is without validity, and cannot be enforced, and there was no error in dismissing the cross-bill.

The decree is affirmed.

STRAHAN, J., did not sit in this case.

 Points decided.

[Filed January 15, 1889.]

JAMES F. BEWLEY, RESPONDENT, v. T. N. GRAVES, APPELLANT.

MOTION TO STRIKE OUT—ASSIGNMENTS OF ERROR—EVIDENCE.—Where a separate defense was stricken out in the court below, and the notice of appeal fails to assign such action of the court as error, such ruling will not be reviewed on appeal, although the appellant offered evidence tending to sustain such separate defense, and excepted when the same was excluded, and assigned said last-named ruling as error in his notice of appeal.

SEPARATE DEFENSE—EVIDENCE.—After a separate defense has been stricken out, it is not error in the court below to exclude all evidence tending to support the same. If the court erroneously struck out a proper defense, the party injured must secure a reversal of such ruling before he can complain that his evidence was improperly excluded.

PLEADINGS—ERRONEOUS RULING UPON.—An alleged error in the court below upon a question of pleading cannot be reviewed or corrected on an assignment of error as to the exclusion of evidence.

COUNTY ROAD—PETITION FOR—"HOUSEHOLDERS."—Section 4062, Hill's Code, does not require that a petition for the location of a county road should declare upon its face that those who sign it are *householders*. It must be *signed* by twelve or more householders, and the fact that it is so signed may be proven by any competent evidence. Such petition is good if it specify the place of beginning, the intermediate points, if any, and the place of termination of said road.

COUNTY COURT—JURISDICTION.—A county court acquires jurisdiction to lay out a county road by the presentation of a petition containing the statutory requisites, signed by twelve or more qualified petitioners, accompanied by a proper notice and proof that the same had been stuck up as required by law.

NAMES ON PETITION AND NOTICE—VARIANCE.—An immaterial variance between the names on the petition and notice is not a jurisdictional defect, and will not render the proceedings void.

COUNTY COURTS—WHEN COURTS OF LIMITED AND INTERIOR JURISDICTION.—When county courts exercise the power conferred by statute to lay out county roads, they are courts of limited and inferior jurisdiction.

COUNTY COURTS—INTENDMENTS AS TO JURISDICTION.—When the fact of jurisdiction is shown, courts of limited and inferior jurisdiction have the same intendment in favor of their proceedings that the courts of general jurisdiction have.

CASE DISTINGUISHED.—The case of *Northern Pacific Terminal Co. v. City of Portland*, 14 Or. 24, distinguished.

APPEAL from Yamhill County.

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George H. Durham, H. Y. Thompson, and W. L. Bradshaw, for Respondent.

McCain & Hurley, for Appellant.

STRAHAN, J.—This is an action to recover damages for an alleged trespass committed by the defendant upon the plaintiff's real property in Yamhill County. The complaint charges a wrongful and forcible entry in the months of April and November, 1886, and the breaking down and destruction of the plaintiff's fence, to their damage in the sum of \$1,880. The answer put in issue all of the material allegations of the complaint, and then, as a further and separate defense, alleges that a certain county road existed on the plaintiff's said land at the place of said alleged entry, and that the fence mentioned was erected and constructed in and across said county road, in such a manner as to obstruct the same, and that at the time of said alleged entry the appellant was road supervisor of the road district where said obstruction was placed, and pursuant to an order of the county court of said county, and as such supervisor, removed said fence from said road, doing no more damage than was necessary in effecting said removal. Another separate defense pleaded in the answer alleged, in substance, that on the eleventh day of March, 1886, the respondents began an action at law against the appellant in the circuit court of Yamhill County, to recover the sum of \$250, damages to the same premises described in the complaint herein, and for injury to the fences and the crops thereon growing on the fifth day of November, 1885, and being the crop in the said complaint first named; that in said complaint in said action it was alleged, in substance, that this defendant had wrongfully thrown down and removed a certain fence of the plaintiff on said premises, on the fifth day of

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November, 1885, and that thereby the said crop was exposed to destruction, and that said crop and premises were damaged in the sum of \$250.

The defendant filed his answer in said action, admitting the removal of the fence, and alleging further, in substance, that the county court of Yamhill County, Oregon, did, on the tenth day of September, 1885, duly establish a county road upon the plaintiff's said premises at the place of said alleged entry, and caused the survey and plat thereof to be duly recorded, and that the same thereupon became and was a county road and public highway, and that said fence was in said county road, and an obstruction thereto; that defendant was road supervisor of district No. 42, in which said road was situated, and as such removed the said fence. These allegations were denied by the reply; that on the twenty-sixth day of March, 1886, the said cause came on to be tried upon said issues before a jury, and the same was duly tried before said jury, and on the twenty-sixth day of March, 1886, said jury duly returned into court a verdict in favor of this defendant, and said court thereupon duly rendered a judgment in said action in favor of this defendant for his costs and disbursements; that the county road referred to in the answer, in the action last above referred to, is the same county road which is first above referred to in this answer, and the fence referred to in the complaint in this cause was removed from the same county road on the same premises, and in the same place, and the issues tried in said action were the same issues, as to the location, existence, validity, and legality of the above-named county road, that are to be tried in this action, by reason whereof the plaintiff is barred and estopped to deny the location, existence, and legality of the above-described county road.

Another separate defense alleged, in substance: "That

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pending the proceedings to establish said county road, the plaintiff had presented to said county court his written, verified claim for damages, or complaint setting forth such proceedings, and alleging that said proposed road ran for the distance of more than a mile over the said premises of said plaintiff, and that by the establishment of said road the said plaintiff would be and was damaged in the sum of \$250, and prayed said court for the appointment of viewers or commissioners to assess such damages; that thereupon, on the eleventh day of July, 1885, the said court duly appointed three disinterested householders of said county such viewers or commissioners, who, after being duly sworn, proceeded to view, assess, and determine how much less valuable the said premises were or would be rendered by the establishment and opening of said road; and did assess, determine, and report to said court that said premises would not be rendered less valuable or be damaged in any sum by the establishment and opening of said road, which report was thereafter duly confirmed by said court." The answer further alleged that on the twenty-eighth day of September, 1885, said plaintiff Bewley duly appealed to the circuit court of said county from such report; on the trial of said appeal the jury found a verdict for the said plaintiff Bewley in the sum of \$47.37; that on the twenty-sixth day of March, 1886, judgment of said court was duly rendered on said verdict in favor of plaintiff Bewley, and against Yamhill County, for said sum of \$47.37 and costs of said appeal, which said sum was thereafter duly paid by said county to the plaintiff Bewley, and by him duly received; that said county road, for the location of which plaintiff claimed damages through his lands, is the same county road first described in this answer, by reason of all of which plaintiff is estopped from denying the existence and validity of said county road.

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On motion of the plaintiff the court struck out the second and third separate defenses, being all of the new matter contained in the answer except the first separate defense, to which the defendant excepted. The reply put in issue the remaining new matter in the answer, except it admitted that at the time alleged the defendant was road supervisor of said road district. The plaintiff had judgment, from which this appeal is taken. The following are the grounds of error which appellant assigns in his notice of appeal upon which he intends to rely in this court:—

1. Said circuit court erred in sustaining plaintiff's objections to the introduction by the defendant as evidence, and in excluding from the jury, the report of viewers and surveyor, and the field-notes and plat of the county road (survey No. 288) named in the answer, copies of which are annexed to the bill of exceptions, and exhibits Nos. 1 to 16 inclusive.

2. The said circuit court erred in sustaining plaintiff's objections and in excluding from the jury, when offered in evidence, the petition or claim of James F. Bewley for damages in said road proceeding, the order of county court appointing viewers to assess damages, and the report of the viewers thereon, the notice of appeal, the verdict of the jury, and the judgment of the court thereon, copies of all of which are attached to the bill of exceptions.

3. The said circuit court erred in sustaining plaintiff's objections to, and in excluding from the jury when offered in evidence by the defendant, the final order of the county court establishing said county road (survey No. 288), and ordering the plat, survey, and field-notes thereof to be recorded, and directing the supervisor to open the road.

4. The said circuit court erred in sustaining plaintiff's objections to, and in excluding from the jury when offered in evidence by the defendant, the judgment roll and judg-

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ment entry, verdict of the jury, and written instructions of the court to the jury in the case of James F. Bewley, plaintiff, against T. N. Graves, defendant, which case was begun in the circuit court of the state of Oregon for Yamhill County, on the twenty-seventh day of March, 1886, copies of which are attached to the bill of exceptions.

5. The said circuit court erred in sustaining plaintiff's objections to, and in refusing to allow the defendant, Thomas N. Graves, while on the stand as a witness, to answer the question propounded by defendant's counsel, as to whether or not the fence alleged by plaintiff in his complaint to have been thrown down by the defendant was in said county road, and an obstruction to the same; and also whether or not the defendant had thrown it down at the same place in said road where he had thrown it down, as mentioned in the former action between the same parties.

1. Before proceeding to a more particular examination of these assignments of error, it is proper to notice the fact that this notice of appeal contains no assignments of error upon the ruling of the court striking out the second and third separate defenses pleaded by the defendant.

We cannot therefore examine those rulings on this appeal, or say whether or not the court erred in striking them out. Equally unavailing are the appellant's assignments of error in relation to the rulings of the court in excluding evidence which tended to sustain the second and third separate defenses which had been stricken out.

If those separate defenses were good, the court erred in striking them out, but after they had been stricken from the pleading it did not err in excluding from the jury all evidence in relation to the same; but we cannot re-examine here an alleged error in pleading or assignment of error in relation to the exclusion of evidence.

2. The remaining assignment of error mostly relied

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upon by the appellant was the ruling of the court in excluding from the jury the record of the county court of Yamhill County, whereby it is claimed by the appellant that a county road was established on the plaintiff's land, at the point which is alleged the defendant broke and entered the plaintiff's close, and to that question our attention will now be directed.

The main objection urged against the sufficiency of the petition for the road is, that it is not stated therein that the petitioners are householders.

Hill's Code, section 4062, sets out the requisites of such a petition as follows: "All applications for laying out, altering, or locating county roads shall be by petition to the county court of the proper county, signed by at least twelve householders of the county residing in the vicinity where said road is to be laid out, altered, or located, which petition shall specify the place of beginning, the intermediate points, if any, and the place of termination of said road."

While it would be convenient in practice to allege in the petition the fact that the petitioners were householders, just as it is alleged that these petitioners reside in the vicinity of where this road is to be laid out, as well as the fact that they are citizens of Yamhill County, we are not prepared to say that such petition is a nullity because it is omitted. The petition is good if it specify the place of beginning, the intermediate points, if any, and the place of termination of said road, and is signed by at least twelve householders.

In *Humboldt County v. Dinsmore*, 75 Cal. 604, the supreme court of California gave a like construction to section 2682 of the Political Code of that state, which is similar to section 4062, *supra*. In disposing of the objection the court said: "It will be perceived at a glance that the requirements of a proper petition under the statute

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do not include an allegation that the signing petitioners are ten freeholders of the road district, and taxable therein for road purposes, wherein the proposed road is to be constructed. This was something, therefore, which the board had the jurisdiction to determine as a fact on the hearing of the matter, from the evidence before them, irrespective of the question as to what the petition may have averred. For this reason the first objection to the introduction of the petition is untenable."

But in addition to this, the record shows affirmatively that the court heard evidence on the question whether or not these petitioners were in fact householders, and found that they were. The record is not therefore silent. It speaks.

The petition describes the road as follows: "Beginning in the center of the Sheridan and Grande Ronde county road, at a point where said road crosses the west line of William Chapman's donation land claim, running thence south on the west line of said Chapman's land about one hundred rods to the southwest corner of said Chapman's land; thence continuing south on the west line of G. W. Berry's land, to the south boundary of Yamhill County, about eighty rods."

The notice substantially, and in every essential particular, follows the same description, and the same was accompanied by sufficient proof of publication. The names on the notice and petition are identical up to the sixteenth name, and then there seems to be some confusion and there appears a greater number of names on the petition than is shown by the notice.

Whatever might be the rule in a direct proceeding by review to annul the action of said county court in establishing the road because it exercised its function erroneously, it is clear that this variance as to the names is not a jurisdictional defect which renders the entire proceed-

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ing void. Nor can we consider, nor is it necessary to determine, the respondent's objection to the admission of parol evidence tending to prove that said notice had been mutilated, and a part of the names which it originally contained had been torn off.

This petition, notice, and proof of posting are sufficient to give the county court of Yamhill County jurisdiction to locate and lay out the county road described in the petition.

Upon the argument here, various objections were taken to the subsequent proceedings in the county courts, not necessary now to notice, but we deem it proper to state the rule of law applicable in such case. It is settled by a line of uniform decisions in this state that the county courts, when they exercise the power of laying out roads, are courts of limited and inferior jurisdiction. (*Thompson v. Multnomah County*, 2 Or. 34; *Johns v. Marion County*, 4 Or. 46; *State v. Officer*, 4 Or. 180; *C. & G. Road Company v. Douglas County*, 5 Or. 280.) It is perhaps equally as well settled that when they exercise the power of ordering the sale of the real property of a decedent to pay debts, they are to be deemed courts of general and superior jurisdiction. (*Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119.) The reason of this distinction is not obvious, especially when the powers in each instance are conferred by statute. But the discussion of that subject is not necessary to the decision of this case.

The county court of Yamhill County, then, being a court of limited jurisdiction in laying out and locating the road in question, are its proceedings void on account of any other matters alleged or apparent in its records after the proof of the sticking up of the notices? We think not. Some of its proceedings may be irregular, and possibly might have been subject to reversal upon a

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direct proceeding for that purpose, but they are not nullities. If the fact of jurisdiction is shown, courts of limited jurisdiction have the same intendments in favor of their proceedings that courts of general jurisdiction have. (*Tucker v. Harris*, 13 Ga. 1; *Cooper v. Sutherland*, 3 Iowa, 114.) In the case last cited the authorities are collated, and they abundantly sustain the proposition, and it is therefore unnecessary to do more than refer to them.

Counsel for respondent rely very much on *Northern Pacific Terminal Co. v. City of Portland*, 14 Or. 24. But it fails to sustain his contention, for two reasons. The common council of the city of Portland cannot be said to be a court in any sense of that term, but it has certain specified and limited powers conferred upon it to lay out and widen streets, etc., which it may exercise by complying with the charter.

This case is clearly distinguishable from the principle suggested in *Northern Pacific Terminal Co. v. City of Portland*, 14 Or. 24. This record is attacked collaterally, and if it needed any presumptions to sustain it against such an attack, we have already indicated what they are. It was suggested upon the argument by respondent's counsel that the alleged trespass was not committed on the line of said road. That is a question of fact which cannot be noticed here. Upon a new trial it can be fully presented to the jury.

This view leads to the reversal of the judgment of the court below, to be followed by a new trial.

Points decided.

[Filed January 16, 1889.]

**J. T. VINCENT AND H. W. VINCENT, APPELLANTS, v.
CHARLES LOGSDON ET AL., RESPONDENTS.**

JOINT CONTRACT AS TO THIRD PARTIES — HOW REGARDED¹ IN A COURT OF EQUITY. — Where two parties jointly contract an indebtedness to a third party on account of a matter in which each of the two has an interest, and they treat it in their dealings with such third party and with each other as a joint affair, a court of equity, in a suit between the parties to adjust their respective rights and liabilities on account of the debts, will, if in accordance with justice, regard it as a joint obligation, and will not undertake to determine that the party for whose immediate benefit it was created was a principal debtor, and that the other, who only received a remote benefit from it, was a mere surety for him, although no privity in fact existed between them.

IN. — Where L. was proprietor of a certain saw-mill, which J. T. V. desired to have removed and located upon land owned by her, subject to a life estate in her father and mother, and L. accordingly removed and located the mill, and J. T. V., being interested generally in having the mill operated, she and L., in order to further the enterprise, requested B. and K., from time to time, to furnish on joint account material, machinery, and labor for the mill, without any understanding between each other as to their respective rights and liabilities, thereby creating a debt against themselves, which became a lien upon the mill: *held*, that the allegations in the complaint to the effect that J. T. V., at the special instance and request of L., became security, and not otherwise, for him, and personally responsible to B. and K. for the material, machinery, and labor furnished by them from the mill, was not sustained by the proof; and that the debt, as between J. T. V. and L., should be regarded as their joint obligation. And J. T. V. having soon after become owner of the mill, and B. and K. having commenced a suit against her and L. and others to foreclose such lien, and enforce payment of said debt; and L., at the instance and request of J. T. V., having deposited a note and mortgage held by him against a third person with B., with directions to the latter to raise money thereon and pay off the debt, which were subsequently, in accordance with an understanding between J. T. V. and L., surrendered up, and another note and mortgage substituted by L. in their stead; and B. having failed to realize any funds from the note and mortgage with which to pay the debt, and J. T. V. having been compelled to pay it: *held*, in a suit by J. T. V. against L., to enforce an application of the note and mortgage to the payment of the debt to her, that the delivery of the note and mortgage to B., as mentioned, constituted an appropriation of them for the purpose of paying the debt, and created an equitable lien thereon to the extent of Logsdon's liabilities;

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and that J. T. V. was entitled to a decree against L. for one half the amount paid by her in satisfaction of the debt, and to have the note and mortgage applied to that purpose.

APPEAL from the Circuit Court for the county of Benton.

John Kelsay and *S. T. Jeffreys*, for Appellants.

W. S. McFadden and *J. W. Rayburn*, for Respondents.

THAYER, C. J.—This appeal is from a decree rendered in a suit brought by the appellants against the respondent Charles Logsdon, to compel a certain note and mortgage in the hands of J. R. Bryson to be applied in payment of an indebtedness originally owing to Belknap Brothers & Kennedy Brothers, for the machinist labor, machinery, and materials furnished by them in repairing a certain saw-mill known as the Caledonia Mill.

The appellants alleged in their complaint that from the thirty-first day of March, 1885, until the seventh day of March, 1886, the respondent Charles Logsdon was owner of the saw-mill, which was situated upon lots No. 2 and 3 and the southwest one fourth of the southwest one fourth, and the east half of the southwest fourth of section 17, township 11 south, range 11 west, Willamette meridian, county of Benton, state of Oregon; that William Stevens and Anna Stevens, his wife, were the owners of said described land for the term of their natural lives, and upon their death it was to revert to the appellants; that on or about the twenty-seventh day of July, 1886, said appellant J. T. Vincent became the owner of said saw-mill property, and appurtenances thereunto belonging, and was still the owner of the same; that the respondent Charles Logsdon, together with the appellants, between the thirty-first day of March, 1885, and the twenty-second day of August, 1885, became indebted to Belknap Brothers & Kennedy Brothers for the machinist labor, ma-

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chinery, and materials furnished on and for said saw-mill in the sum of \$444.50; that the appellant, at the special instance and request of the respondent Charles Logsdon, became security, and not otherwise, for the said respondent, and personally responsible as aforesaid to said Belknap Brothers & Kennedy Brothers for said machinist labor and materials furnished upon and for said saw-mill for the said sum of \$444.50; that said respondent, to indemnify and save harmless the appellants, for and in consideration of their becoming bound for said indebtedness, agreed to deliver, and did deliver, on or about the first day of November, 1885, to said Bryson the said note and mortgage, which were signed by J. A. Hawkins in favor of the respondent, to the amount of \$918; that, by mutual consent and agreement between the respondent and the appellant J. T. Vincent, said note and mortgage were taken up, and in lieu thereof the note and mortgage set out in the complaint were substituted; that the said note and mortgage were delivered to said Bryson with the intention and purpose that he should borrow a sum of money sufficient to pay said demand of Belknap Brothers & Kennedy Brothers; that suit was commenced in said circuit court by said Belknap Brothers & Kennedy Brothers to enforce payment of said indebtedness against appellants and the respondent, and a decree obtained in favor of the former, by which it was decreed that the latter pay said \$444.50, also attorneys' fees, amounting to \$60, together with the costs and disbursements of the suit; also that the saw-mill and appurtenances belonging thereto, and three acres of land upon which the mill is situated and adjacent to it, be sold to pay said debt, fees, costs, and disbursements; that the appellant J. T. Vincent has paid in full said debt, fees, costs, and disbursements, amounting in the aggregate to the sum of \$637; and that the said respondent was wholly insolvent, and

had no other means to pay said indebtedness except said note and mortgage.

The respondent Charles Logsdon, and Margaret Logsdon, his wife, the latter in the mean time having been made a party defendant in the suit by order of the court, filed an answer to the said complaint, in which they denied all the material allegations contained therein. Said parties then attempted to set up a further defense, but the matter is so awkwardly and unskillfully stated, and contains so many repetitions, that it will puzzle any one to find out what is meant by it. It contains a statement, in substance, that Charles Logsdon assigned to said Bryson the first note and mortgage alleged in the complaint to have been delivered to the latter on or about the first day of November, 1885, in trust for the benefit of the said Margaret Logsdon, the Philomath College, and J. E. Henkle & Co., with the understanding that Bryson should collect it, and after deducting his fees for collection, should pay one hundred dollars of the balance to the college, two hundred dollars to said J. E. Henkle & Co., and the remainder, about six hundred dollars, to the said Margaret, who was alleged to be the owner and holder of the note and mortgage to the extent of that sum. They further alleged, in substance, that, in consideration of the said note and mortgage, said J. T. Vincent agreed to make and execute to Margaret Logsdon a good and sufficient deed of conveyance to said saw-mill, together with sufficient ground for the convenient use of it; and that thereupon, relying upon said agreement, the said Charles Logsdon deposited the said note and mortgage with said Bryson with the express understanding with said J. T. Vincent and said Bryson that a part of said note and mortgage, when collected by said Bryson, should be applied upon said indebtedness to Belknap Brothers & Kennedy Brothers, provided that said J. T. Vincent should

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first make and execute such deed of conveyance of the saw-mill, appurtenances, and ground as aforesaid free from all liens and encumbrances; that said J. T. Vincent had wholly failed and neglected to make and execute such deed, although often requested so to do; that said Charles Logsdon, after the said failure, on or about March, 1886, took up and canceled the said note and mortgage first deposited, and that the second note and mortgage was upon the conditions and terms set out therein, and not otherwise.

The appellants filed a reply to the new matter in the answer, denying the material allegations contained therein. It appears from the transcript that the Philomath College and J. E. Henkle & Co. were also made defendants in the suit by order of the said circuit court.

Upon the hearing of the case, on the allegations and proofs taken therein, the said court decreed that the appellants' complaint be dismissed, which is the decree appealed from. The affairs of the parties involved herein are so badly complicated that it is nearly impossible to ascertain their respective rights and liabilities.

The appellants are husband and wife, and the latter, Mrs. J. T. Vincent, seems to have had the principal control of their matters. Logsdon appears to have had extensive business relations with them, and to have been largely in their debt, but what the business consisted of, or how the debt arose, is only hinted at in the evidence submitted. Mrs. Vincent testified that she began trusting him and selling him goods about the middle of July, 1884, and trusted him to goods and paid his bills right along to August, 1885, he assuring her all the time that he had plenty of property to pay her for everything. But what Logsdon's business was is not shown. I infer that he had a saw-mill at a place called Depot Slough, which he moved around to Caledonia, and set up on land

belonging to Mrs. Vincent, subject to a life estate in her father and mother, William Stevens and wife.

Mrs. Vincent was asked, when on the stand as a witness, to explain why it was that she settled Logsdon's bills which she stated that he agreed to pay her afterwards, to which she made the following answer: "We were anxious to have the mill around the place, and after it was there, we wished to see it a-moving or working, or whatever you are a mind to call it; and as Mr. Logsdon did not have the ready means, and we supposed him a good and honorable man, we furnished him with means to carry on his business as long as we could for the want of means ourselves, or myself, whichever you are a mind to; and the 1st of August, 1885, I told him that I could not help him any longer."

This answer and other evidence and circumstances in the case indicate that the Vincents encouraged Logsdon in the prosecution of an enterprise which apparently was beneficial to them and very unprofitable to him. They alleged in their complaint that at his special instance and request, "and not otherwise," they became security for him, and personally responsible to Belknap Brothers & Kennedy Brothers for the labor and material furnished for the mill out of which the debt arose that is the subject of contention between the parties; but their allegation upon that point is wholly disproved by the evidence.

Kennedy, one of the firm of Belknap Brothers & Kennedy Brothers, testified that H. W. Vincent told him that they, meaning Vincent and Mrs. Vincent, owned an interest in the Logsdon mill, and ordered machinery for it from them (referring to said firm). Ordered it shipped to Vincent and Logsdon, Caledonia, Oregon. That said firm, between April 1, 1885, up to and during the month August, 1885, furnished machinery, material, and mechanics' labor for the repair of and use in the mill;

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that H. W. Vincent first applied for and ordered the first bill of machinery; that Mrs. Vincent shortly after countermanded the bill by letter sent by Charles Pearse, who gave a second order, directed in the letter. Afterwards, said H. W. Vincent ordered machinery and repairs, as also did Mrs. Vincent. Some of the repairs which Mrs. Vincent ordered she paid for at the time, and some she sent money afterwards. This machinery was ordered shipped to Vincent & Logsdon, Caledonia. That Mrs. Vincent or H. W. Vincent applied or requested their firm to furnish said machinery and material, or any part of it, on the individual credit of Charles Logsdon, except one job, which was the making of a valve-stem, the last item on the bill, September 11, 1885; that their firm joined Charles Logsdon in the suit to recover pay for this machinery and material, because Vincent and others had informed them that there was a copartnership of H. W. Vincent and J. T. Vincent and Charles Logsdon, under the firm name of Vincent & Logsdon.

The testimony of S. E. Belknap, another member of the said firm of Belknap Brothers & Kennedy Brothers was to the same effect. Both of these witnesses gave proof that H. W. and J. T. Vincent did not become security for Charles Logsdon in the purchase of the machinery and material out of which the said debt arose, but that all three of them were principal contractors, and that the Vincents had far more to do with ordering the articles than Logsdon did.

It also appeared in proof that on the sixth day of April, 1885, the said Charles Logsdon executed to the said William Stevens an instrument in writing, under seal, whereby, in consideration of two thousand dollars, he granted to the said Stevens the said saw-mill, and all the fixtures and appurtenances thereunto belonging, which said instrument was, on the tenth day of April, 1885, duly

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recorded in the office of the clerk of the county of Benton; and that the said Stevens claimed ownership thereof from May, 1885.

In view of this evidence, and the fact that the mill was located on land belonging to Mrs. Vincent and the Stevenses, and that Mrs. Vincent became the owner of the mill in less than a year after the material was all furnished, it would appear inequitable to hold that Logsdon was the principal debtor to Belknap Brothers & Kennedy Brothers on account of the said machinery, material, and labor furnished by them, and that the Vincents were mere sureties for the payment of the debt thereby created; or, that as between Logsdon and the Vincents, that the former should be required to pay any part of it.

It appears, however, from the testimony of C. H. Pearse, a witness in the suit, that Mrs. Vincent and Logsdon had a settlement of their affairs on the first day of August, 1885, and that a written memorandum was made at the time showing how their accounts stood. Mrs. Vincent having testified that she had the original writing, but that it was lost, and after diligent search could not be found, the witness undertook to state what it contained. His statement was as follows: The writing contained, first, a full statement of all sums due from Charles Logsdon and all sums due to Charles Logsdon, leaving a balance against him of about four thousand one hundred dollars. He was then credited with two thousand dollars as being secured, and agreed to give note and mortgage on his farm for the remaining two thousand one hundred dollars (or about). He was charged with all moneys expended up to August 1st for his benefit; that is, any moneys expended relating to the improvement of the mill. There remained several unsettled claims, or partially settled, notably the Belknap Brothers & Kennedy Brothers'. In these claims (these unsettled claims, that is), he was charged

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with moneys actually expended,—in the Belknap case about seventy-nine dollars. It was understood or agreed that all unsettled claims should be paid by Charles Logsdon; in his failure to pay these claims, J. T. Vincent should pay them, and increase his indebtedness to her by that amount. The agreement was taken first in the form of a memorandum, there being present Mr. and Mrs. Vincent, Mr. and Mrs. Logsdon, and myself. The memorandum was signed afterwards. I made two copies of this memorandum; one was signed by J. T. Vincent and given to Charles Logsdon; the other was signed by Charles Logsdon and given to Mrs. Vincent, together with the original memorandum. The witness thought that there remained unsettled of the Belknap Brothers and Kennedy Brothers' claim, that time, about three hundred dollars. It appears, also, from the testimony of Mrs. Vincent and William Stevens, that the grant of the mill by Logsdon to the latter, on the sixth day of April, 1885, was intended as a mortgage to secure two thousand dollars, the consideration money therein mentioned. Said witnesses testified that Mrs. Vincent used two thousand dollars belonging to Mr. Stevens for Logsdon's benefit, and that Logsdon secured its payment to Stevens in the way mentioned. And it further appeared, from the testimony of F. S. Trevit, a witness in the case, that, in March, 1886, he bought the mill; that he had a talk with Mrs. Vincent about it, and she told him that it belonged to Logsdon; that her father had a bill of sale of it for two thousand dollars, but that he had given Logsdon a writing that he would relinquish it to the latter by his paying the two thousand dollars, on the first day of January, 1887. After that, witness met Logsdon at the mill, and he asked him what he expected to get for it. To which Logsdon answered, that if he sold it, he expected to get four thousand dollars for it. That the next time he saw Mrs. Vincent to talk with her

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about it, he told her the conversation that he had had with Logsdon, and she said that to satisfy Logsdon about the price of the mill, and to induce him to give up the obligation, she would give him one thousand dollars in addition to what witness had offered him, which was two thousand dollars; that in a conversation witness afterwards had with Logsdon, he had concluded to take the three thousand dollars, and that was the way the trade was made.

It appears, also, that some time in the early part of October, 1885, William Stevens signed a written defeasance, which recited that Charles Logsdon did, on or about the first day of May, 1885, make, execute, and deliver over to him a bill of sale of the steam saw-mill, etc., which, although absolute in form, was intended to secure to him the payment of the sum of two thousand dollars, with interest at ten per cent per annum from the date of the bill of sale, and which contained an agreement on the part of Stevens to the effect that if Logsdon paid him said sum and interest on or before the first day of January, 1887, he would execute and deliver to Logsdon's wife, Margaret, a release in her favor of all claims on the mill; otherwise all their right therein should be forfeited.

The respondents claim that this defeasance was never delivered to Logsdon, and that he had nothing to do with it. They also controverted the other testimony referred to. I think that the transactions in regard to the settlement and sale of the mill were had as testified to by the witnesses named; but at the same time I am very much inclined to the belief that Logsdon was only a passive party in the affair. It looks to me as though he has had very little volition in the business transactions between himself and Mrs. Vincent; that the straight of the matter is, that she has really represented both parties in their contracts, trades, and settlements with each other. She

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proved by the witness Pearse that when she settled with Logsdon she signed a writing containing an agreement that all unsettled claims, including the claims of Belknap Brothers & Kennedy Brothers, should be paid by him; that "in his failure to pay these claims, she should pay them and increase his indebtedness to her by that amount." And yet when said firm brought suit to foreclose a mechanic's lien against the saw-mill for said claim, making her, H. W. Vincent, and Logsdon parties to the proceeding, instead of paying it herself, as per agreement, she had Logsdon at Bryson's making an arrangement with the latter to get the case put over until the next term, and to devise means to pay off the claims.

Mr. Bryson testified, as a witness in the case, in answer to the question, "Please state for what purpose this note and mortgage were given you," as follows: "I will give you the circumstances, and state what was said at that time, as near as I now remember it. Mrs. J. T. Vincent, H. W. Vincent, and Charles Logsdon had been sued in this court by Belknap Brothers & Kennedy Brothers for about four hundred dollars upon a mechanic's lien against the Caledonia saw-mill property. They employed me to represent them in the case, and to put it over, if possible, until the spring term of court, for which they were to pay me fifty dollars. Mrs. Vincent and Mr. Logsdon came to my office together and talked over the case, and were trying to devise means to raise the money to pay off this claim. During the conversation, it was stated by one or both of them that Mr. Logsdon had this note and mortgage against Hawkins which I have mentioned, and they asked me if the money could be raised on the note, or the note be collected. Mr. Logsdon told me that it was a first mortgage; at least, he did not say anything about there being another lien upon the property at the time, as I now remember it. I told them that I thought I could

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either collect that note or get money on it. The note was in Judge Holgate's possession. Mr. Logsdon left my office, got the note and mortgage, and brought them to me to collect the note and pay my fees in the Belknap-Kennedy case for collection out of it, and pay off the claim of Belknap Brothers & Kennedy Brothers out of the remainder.

The witness, upon being asked what became of that note, if anything, answered: "I found upon examining the records that there were other liens against the property prior to this one,—one in favor of Leabo for about five hundred dollars, and one in favor of America Hawkins for about one thousand dollars. I was unable to then collect the note or raise money on it, as the mortgaged property was only worth about two thousand five hundred or three thousand dollars, and after consulting with both Mrs. Vincent and Mr. Logsdon, it was agreed that I should take a new note and mortgage for the amount due. By so doing, this became a second mortgage, Leabo's mortgage being first, and America Hawkins, who is the mother of J. A. Hawkins, taking a third mortgage for her amount for about one thousand dollars. This agreement was consummated March 11, 1886. Mr. Logsdon came in from the bay the preceding day. He told me he had nothing more to do with the Caledonia mill property nor the Belknap-Kennedy claims, and wanted me to take the note and mortgage in the name of his wife, Margaret Logsdon. I had not heard from Mrs. Vincent in reference to the matter, and declined to do this, but agreed that it should be taken in his name, and the note and mortgage transferred to me, and then I would hold the same in trust, to be paid to Margaret Logsdon, after first paying my own fees; and there was also one hundred dollars and interest to be paid to Philomath College, two hundred dollars and interest to be paid to J. E. Henkle, when the same was collected in full, these amounts

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being offsets against Logsdon on the original note in favor of J. A. Hawkins; provided that Mrs. J. T. Vincent waived all claims on the note, or provided that she failed to establish such claims; that is, the surplus, after paying my own claim, Philomath College claim, J. E. Henkle's claim, to be held by me in trust for Margaret Logsdon, providing Mrs. J. T. Vincent was not entitled to the same or some part thereof."

Mrs. Vincent does not seem to have claimed in this conference that the debt belonged to Logsdon to pay. She appears to have been more exercised about devising ways and means by which to secure its payment. She did not demand as a right that Logsdon should make use of the note and mortgage against Hawkins by which to raise funds in order to pay off the debt, though she was doubtless willing that that course should be pursued to accomplish the result.

Logsdon claims that he deposited the note with Mr. Bryson, and authorized him to raise money on it with which to pay the debt, upon the condition that Mrs. Vincent should deed to his wife the saw-mill, with sufficient ground upon which it stood and adjacent thereto for the convenient use of it. But no such arrangement evidently was made in the presence of Mr. Bryson, nor was he informed of it. If he had been, he would doubtless, being a lawyer, have had the arrangement put in writing, or, at least, have suggested to the parties the necessity of doing so. It is hardly possible, it seems to me, that any such arrangement was made at the time, or that the parties took into consideration their respective rights and liabilities as between themselves. They had all, probably, been served with a summons in the suit, and were mainly intent upon contriving means by which the matter could be adjusted. In all their business transactions they seem to have been wholly indifferent regarding their obliga-

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tions to each other, and to have managed their affairs as though their interest in them was in common. Logsdon denies that he had anything to do with the creation of the debt. He insists that he sold the mill to Stevens on the sixth day of April, 1885, and has had no interest in it since that time; but the evidence shows to the contrary, — shows that he had possession of the mill, and used it up to the time it was sold to Trevitt.

Mrs. Vincent confesses that she had an interest in having the mill located at Caledonia, and wished to see it moving after it was brought there; and that she had a pecuniary interest in it is quite apparent.

The settlement between the parties, pretended to have been made on the first day of August, 1885, according to the appellants' own showing, was left at loose ends. That they settled up everything except the outstanding unsettled claims against them, which they allowed to remain and increase, is very remarkable; more especially so in view of the testimony of Mrs. Vincent that on that date she told Logsdon that she could not help him any longer.

Where parties have dealt with each other in a particular manner, I do not see any better way in adjusting their affairs, as between themselves, than to recognize and carry out the mode which they themselves have adopted and pursued. In this case the parties contracted the debt in question jointly. In doing so, they evidently consulted their respective interests, and each was benefited thereby. I think, therefore, that the debt should be regarded as a joint obligation, not only as between them and their creditor, but as between themselves. Under this view, Charles Logsdon should be held liable for one half of the \$444.50, and the appellants for the other one half thereof. The appellants have paid, in addition to the debt, the costs of the foreclosure of the lien. This might have been avoided by paying the debt before suit, and it

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seems to have been the understanding that Mrs. Vincent should pay all unsettled claims in case Logsdon failed to pay them, and thereby increase his indebtedness to her; but Logsdon was equally liable with her for their payment, and equally responsible for the neglect to pay them.

The amount of the costs of the foreclosure does not appear. The appellants alleged in their complaint that the full amount paid by them on account of the debt and costs aggregated \$637; that is, however, denied in the answer, and the only evidence in the suit regarding the matter which I have been able to discover is in the testimony of Mrs. Vincent. She testified that she had paid in the settlement of the claim in full something over six hundred dollars; that she did not remember the exact amount. Under this proof, we would only be justified in finding that she paid six hundred dollars in settlement of the claim in full.

The respondents' counsel claims that the appellants must fail in their suit for the reason that they failed to show any consideration or agreement whatever for the deposit of the first note and mortgage, either as security for Charles Logsdon, or otherwise; that there was any agreement between Mrs. Vincent and Logsdon for taking up the first note and mortgage, and taking the note and mortgage of March 11, 1886, in lieu thereof; or that appellants, or either of them, became bound or indebted to Belknap Brothers & Kennedy Brothers in the sum of \$444.50, or any other sum, for Charles Logsdon.

We disagree with the counsel as to the facts assumed by him in the first two propositions. We think the testimony of Mr. Bryson shows to the contrary. Upon the third proposition he may be said to be technically correct as to the facts; but if the debt were a joint obligation on the part of the appellants and Logsdon, as we conclude it was, the delivery of the note and mortgage to Mr. Bryson

Points decided.

to enable him thereby to raise funds with which to pay the debt would constitute, in equity, a pledge of them for that purpose; it was an appropriation of them for its payment, and created an equitable lien thereon to the extent of Logsdon's liability upon the debt. In our opinion, the appellants are entitled to a decree against the said Charles Logsdon for the sum of three hundred dollars, to be paid out of the said note and mortgage in the hands of J. R. Bryson, after first paying to the latter the sum of fifty dollars, and any additional fees or expenses he may be entitled to or incur; and that the balance and residue of said note and mortgage be paid to Margaret Logsdon, subject to the condition as stated herein; that neither party is entitled to costs, but that each of them be required to pay one half of the fees of the clerk of this court incurred herein; that the said Bryson be appointed a receiver to collect the said note and mortgage or otherwise dispose of the same, and from the proceeds thereof retain and pay out the several sums specified, also the fees of the said clerk, reserving one half thereof from the appellants' three hundred dollars, and that he pay the residue to the respondent's counsel herein.

[Filed January 16, 1889.]

D. W. APPELATE, RESPONDENT, v. B. F. DOWELL,
APPELLANT.

LAW OF THE CASE—SECOND APPEAL.—The decision of this court becomes the law of the case, and upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart.

APPEAL from Douglas County.

R. & E. B. Williams and *J. W. Hamilton*, for Respondent.

James F. Watson and *B. F. Dowell*, for Appellant.

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23 135
24 441
20* 429
31* 282
33* 987

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41 142
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42 518

17 299
148 595

Points decided.

STRAHAN, J. — When this cause was before this court on the former appeal (*Applegate v. Dowell*, 15 Or. 513), the law applicable to the facts then presented was fully stated and discussed. The cause was tried as an action at law under the act of 1885, and finding error, this court remanded the case for a new trial.

Upon the second trial, no new facts that were material were developed, and the court below simply applied the principles of law announced by this court to the facts as they appeared, which resulted in a decree for the plaintiff, from which the defendant has appealed.

Upon this appeal, we are not at liberty to depart from the law announced in the case on the previous appeal.

The decision then made became the law of the case, binding alike upon the court and the parties on any subsequent appeal. (*Powell v. D. S. & G. R. R. Co.*, 14 Or. 22; 2 Herman on Estoppel, p. 118, note 1.)

[Filed January 28, 1889.]

THE STATE OF OREGON, RESPONDENT, v. B. A.
GODFREY, APPELLANT.

DANGEROUS WEAPON — ASSAULT. — To point an unloaded gun at another, at a distance of from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon.

ASSAULT. — To constitute an assault, there must be an intentional attempt by violence to do injury to the person of another, and such attempt must be coupled with the present ability to do such injury.

DANGEROUS WEAPON DEFINED. — A dangerous weapon is one by the use of which death or great bodily harm may be inflicted.

DANGEROUS WEAPON — UNLOADED GUN. — An unloaded gun in the hands of the defendant, four or five rods from the prosecuting witness, is not a dangerous weapon. Without the use of a dangerous weapon the defendant could not commit the crime charged, and such weapon was not dangerous in a legal sense, unless at the time of its use it was capable of producing death or great bodily harm.

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LETHAL WEAPON — PROVINCE OF THE JURY. — Guns, swords, pistols, knives, and the like are lethal weapons, as a matter of law, when used within striking distance from the party assaulted; all others are lethal or not according to their capability of producing death or great bodily harm in the manner in which they are used, and of this the jury must be the judges: *accordingly held*, that in this case if the gun was loaded, it was a lethal weapon; if otherwise, it was not.

ASSAULT WITH A DANGEROUS WEAPON — INTENT. — To constitute the crime of being armed with a dangerous weapon, and assaulting another with such weapon, no specific intent to inflict death or great bodily harm is necessary. No other intent is necessary than that which is embraced in the act of being armed with a dangerous weapon, and making an assault upon another with such weapon.

APPEAL from Klamath County.

W. M. Colvig, District Attorney, for the state.

Cogswell & Cogswell and *J. W. Hamaker*, for Appellant.

STRAHAN, J. — The defendant was indicted by the grand jury of Klamath County for being armed with a dangerous weapon, to wit, a Winchester rifle, and assaulting H. J. Chrisman with such rifle.

The evidence of the assault introduced upon the trial tended to prove that the defendant, when not less than thirty yards nor more than seventy yards from said Chrisman, pointed a Winchester rifle at him and threatened to kill him if he did not turn back. His words were, "Turn back, you dirty son of a b-~~l~~^lch, or I will kill you." The transcript shows there was no direct evidence that the gun was loaded, or that the defendant cocked it, or did anything except to point the gun at Chrisman, and use the language above quoted. There was evidence tending to prove that Chrisman was frightened and fled from the defendant.

At the conclusion of the evidence, the court, amongst other instructions, gave the jury the following: "If you believe from the evidence, beyond a reasonable doubt, that,

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at the time and place as charged in the indictment, B. A. Godfrey pointed a gun at Herbert J. Chrisman in a menacing and threatening manner, as if to shoot, and the said Chrisman was then within carrying distance of said gun, and that the said Chrisman, as a reasonable man, was, under the circumstances as then presented to him, justified in believing that the defendant intended to shoot him, and did so believe, and was in fear of being shot by said defendant, and, under such fear, fled from said defendant, without knowing whether said gun was loaded or not, then the defendant is guilty, no matter whether the gun was loaded or not."

The court further instructed the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that, at the time and place as charged in the indictment, said Herbert J. Chrisman and another person were in a cart or buggy together, and that said defendant, Godfrey, pointed a loaded gun at both of them in a threatening manner, and under the circumstances mentioned in the last instruction (No. 1), within carrying distance of said gun, then you must find the defendant guilty."

To the giving of each of these instructions the defendant excepted.

The defendant asked the following instructions, all of which were refused by the court, and separate exceptions saved to the ruling in each case:—

"1. A dangerous weapon is one capable of producing death or great bodily harm.

"2. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.

"3. An unloaded gun at a distance of four or five rods from the party alleged to have been assaulted is not a dangerous weapon.

"4. Whether or not the defendant in this action was

at the time of this alleged assault armed with a dangerous weapon, is a question of fact which you are to determine from the evidence, and in doing so, you are to take into consideration all the circumstances,—whether or not the gun was loaded, the distance the parties were from each other, the manner of its use,—and unless you are satisfied, beyond a reasonable doubt, from all the circumstances in the case, that he was armed with a weapon which, at the distance the parties were from each other, was capable of producing death or great bodily injury, then you must acquit.

“5. One of the questions for you to determine is, whether the gun with which it is charged the defendant committed the assault was loaded; and unless it is established beyond a reasonable doubt that the gun was so loaded, you will have to find that it was not loaded; and should you find that the gun was not loaded, then you will have to decide from the evidence whether an unloaded gun, at the distance the defendant was from the prosecuting witness at the time of the alleged assault, was a dangerous weapon, and if not, then you must acquit.”

The first instruction given by the court, to which an exception was taken in effect, told the jury that if the defendant pointed the gun at Chrisman, under the circumstances therein enumerated, the defendant was guilty, no matter whether the gun was loaded or not. This is equivalent to saying that it is a felonious assault to point an empty gun at another, whereby he is put in fear, and flees. Such an act, no doubt, deserves the severest reprehension, but unless it constitutes an assault, the conviction cannot be sustained, no difference what view we may take of the other questions presented.

Burrill's Law Dictionary defines an assault to be an unlawful setting upon one's person. (Finch's Law, b. 3, c. 9.) An intentional attempt by violence to do a corpo-

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real injury to another. (Wharton's Crim. Law, 311; 1 Hill, 351.) An attempt or offer, with force or violence, to do a corporeal hurt to another, as by striking at him with or without a weapon, or presenting a gun, etc. Rapalje defines it thus: "An assault is: 1. An attempt unlawfully to apply an actual force, however small, to the person of another, directly or indirectly; 2. The act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person." (1 Law Dict., tit. Assault.) Any willful and unlawful attempt or offer with force to do a corporeal injury to another. (1 Abbott's Law Dict., tit. Assault, 90.)

But these definitions furnish no certain or satisfactory solution of the question, and if we look at the adjudged cases, they appear to be irreconcilable.

Chapman v. State, 78 Ala. 463, is a late and well-considered case holding that to present and aim an unloaded gun at a person within shooting distance, in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a civil action for damages. This case presents the leading authorities on both sides of this question, and sums up the result reached by the court thus: "The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobrious language has this tendency, and no words, however violent or abusive, can at common law constitute an assault. It is unquestionably true that an apparent attempt to do corporeal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace; for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted had a right to act upon appear-

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ances when they create reasonable grounds from which to apprehend imminent peril. There can be no difference in reason between presenting an unloaded gun at an antagonist in an affray and presenting a walking-cane as if to shoot, providing he honestly believes, and from the circumstances has reasonable grounds to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other, and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages.

"The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or in creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and therefore entirely free from alarm. (*People v. Lilly*, 43 Mich. 525; 1 Crim. Law Mag. 605.) And one may be put in fear under pretense of begging, as in *Tapline's Case*, occurring during the riots in London, decided in 1780, and reported in 2 East P. C. 712, and cited in many of the old authorities."

These views are sustained by *State v. Napper*, 6 Nev. 113; *Regina v. James*, 47 Eng. Com. L. 530; *Black v. Bernard*, 38 Eng. Com. L. 365; *People v. Lilly*, 43 Mich. 521; *Robinson v. State*, 31 Tex. 171; *Lawson v. State*, 30 Ala. 14; *McKay v. State*, 44 Tex. 43; 3 Greenl. Ev., sec. 61; *People v. Jacobs*, 29 Cal. 579. Numerous other cases to the same effect are carefully collated in 1 Am. & Eng. Ency. of Law, 815, 816.

I think these authorities clearly show that to constitute an assault there must be an intentional attempt to do injury to the person of another by violence, and that such attempt must be coupled with a present ability to do the injury attempted. It is equally manifest that the element of fear or apprehension on the part of the person against

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whom the attempt is made cannot be controlling or in any way influence the conclusion, for the reason that such person may be assaulted and be wholly unconscious of the injury. I am therefore of the opinion that the first instruction given by the court was erroneous.

2. Turning now to the instructions asked on the part of the defendant, we are of the opinion that No. 1 ought to have been given. A dangerous weapon is a necessary element in the commission of the crime for which the defendant was indicted. Without it he could not be guilty of the felonious assault charged. The instructions asked briefly defined such weapon, and its refusal was error.

3. So in regard to instruction No. 2 asked by defendant, defining an assault. An unlawful attempt to do injury to the person of another, without the ability to accomplish it, would not constitute an assault, nor would the ability without the attempt be sufficient. Both elements must concur. This instruction, then, should also have been given.

4. Instruction No. 3 asked by the defendant should also have been given. Manifestly, an unloaded gun in the hands of the defendant four or five rods from Chrisman was a harmless implement, with which no personal injury could possibly have been inflicted upon Chrisman. Without the use of a dangerous weapon the defendant could not commit the crime charged, and the weapon was not dangerous in a legal sense, unless at the time of its use it was capable of producing death or great bodily harm.

5. Under the circumstances disclosed by this record, the fourth instruction asked by appellant contained a correct statement of the law, and should also have been given. Some weapons under particular circumstances are so clearly lethal that the court may declare them to be such as a matter of law. Of this class are guns,

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swords, knives, pistols, and the like, when used within striking distance from the victim; all others are lethal or not according to their capability to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. It is a question of fact, the termination of which properly belongs to them. In the case under consideration, the gun was a lethal weapon if it was loaded, otherwise it was harmless. It was therefore the peculiar and exclusive province of the jury to say whether this was so or not, and the court erred in so refusing to instruct them.

6. Instruction No. 5, also asked by the defendant, depends upon the same principles as No. 4, and its refusal was error, for the same reasons given in reference to No. 4.

7. The defendant also asked the court to give the jury the following instruction, numbered 7: "Unless it is established beyond a reasonable doubt that the defendant at the time of the alleged assault intended to inflict death or great bodily harm upon Chrisman, coupled with a present ability to carry the same into effect, you must acquit." This instruction was properly refused. No specific intent is necessary to constitute the crime under this statute other than such as may be embraced in the act of making an assault with a dangerous weapon. This simply embraces the intentional and unlawful use of a dangerous weapon, by means of which an assault is committed with such weapon upon the person of another.

One or two other unimportant exceptions were taken, but it is unnecessary to notice them, as every principle of law involved in the case is disposed of by what is said on the questions above suggested.

The judgment will be reversed, and a new trial had in the court below.

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[Filed January 28, 1899.]

CHARLES KOHN & CO., APPELLANTS, v. I. S. HINSHAW, SHERIFF OF BAKER COUNTY, RESPONDENT.

PLEADING—CONSTRUCTION.—A party's pleading is to be construed most strongly against himself, for the purpose of determining its sufficiency.

STATUTORY CONSTRUCTION—SECTION 154, HILL'S CODE.—The word "may" in this section held to be equivalent to the word "must," and therefore when a sufficient undertaking is tendered to the sheriff under this section by a claimant of the property attached, it is his duty to accept it, and to deliver the attached property to such claimant.

STATUTORY CONSTRUCTION—"MAY."—When the word "may" is used in a statute in conferring power upon a court officer, or tribunal, and the public or a third person has an interest in the execution of the power, the exercise of the power becomes imperative.

UNDERTAKING—LIEN OF ATTACHMENT.—By the execution of the undertaking provided for by section 154, Hill's Code, the lien created by the attachment is not vacated or destroyed.

SHERIFF—NEGLECT—ACTION—PLEADING.—In an action against a sheriff for a neglect of an official duty, the complaint must allege the particular neglect or omission upon which the plaintiff relies.

SHERIFF'S DUTY—EXECUTION.—After receiving an execution in an action where property has been attached and delivered to a claimant upon executing the usual undertaking, the limit of the sheriff's duty is to make a demand for the property bonded, and if the same is not delivered to him, to make a return of all of his proceedings to the court.

FAILURE OF THE CLAIMANT TO DELIVER THE PROPERTY—PLAINTIFF'S REMEDY.—If the claimant fail to deliver the property attached according to the terms of his undertaking, the plaintiff may bring an action on such undertaking in his own name. He is the person for whose benefit such undertaking was executed, and is the real party in interest.

APPEAL from Baker County.

J. W. Whalley, and Hyde & Hyde, and C. A. Johns, for Appellant.

Olmstead & Anderson, for Respondent.

J. J. Shaw, for Claimants.

STRAHAN, J.—This action is prosecuted by the plaintiffs to recover against the defendant, who is the sheriff

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of Baker County, Oregon, the sum of \$563 damages, and \$55.06 costs and disbursements expended in another action, with costs of this action.

From the amended complaint it appears that about the month of August, 1887, the plaintiff commenced an action in the circuit court of Baker County to recover of one Daniel Cochrane the sum of \$563, with costs and disbursements, and caused a writ of attachment to be issued in said action, and placed the same in the hands of the defendant, as sheriff of Baker County, for service; that by virtue of said writ, the defendant, as such sheriff, seized several barrels of whisky as the property of said Daniel Cochrane; that afterwards, on the seventh day of September, 1887, the plaintiff duly recovered a judgment in said action for the sum of \$563, and \$55.06 costs and disbursements, and on the same day caused an execution to be issued on said judgment, which execution was duly placed in the hands of the defendant, sheriff of said Baker County, for service; that at the time of the issuance of said attachment, and at the time of the commencement of said action, and the seizure of said property by virtue of said writ, and at the time of the issuance of said execution, and the delivery thereof to the defendant as sheriff, the said Daniel Cochrane was and still is the owner of said several barrels of whisky, which were of the value of \$650; that said sheriff has not applied said whisky on said execution as directed by said execution, nor has he sold the same as commanded by said writ, and said Daniel Cochrane did not have and has not any other property subject to levy under said execution, by means whereof the plaintiffs have been deprived of all means of satisfaction of said execution; that plaintiffs are informed that said sheriff delivered said whisky to certain claimants thereof upon the giving to said sheriff an

undertaking for the redelivery thereof, or payment of the value thereof to said defendant as sheriff, as aforesaid.

To this complaint the defendant demurred, which being sustained by the court, final judgment was entered against the plaintiffs for costs and disbursements, from which they have appealed to this court.

1. Upon the argument here a preliminary objection was taken by the appellants to the effect that it did not sufficiently appear from the complaint that the attached property had been delivered by the defendant to any person upon receiving the statutory undertaking therefor by the sheriff. His objection is, that the allegation in the complaint that "plaintiffs are *informed* that said sheriff delivered said whisky," etc., is not equivalent to the direct allegation that he had so delivered it.

It would seem somewhat paradoxical to allow a pleader to take advantage of an admitted defect in his own pleading for the sole purpose of escaping a more serious objection urged by his adversary; in other words, using its admitted weakness at one point for the purpose of giving it strength at another. But however this may be, applying the ordinary rule that a party's pleading is to be construed most strongly against himself, for the purpose of determining its sufficiency, and the objection vanishes. Besides, this is an objection as to form only, not urged or taken in the court below, and it ought not to be controlling on this appeal. For the purpose of testing the sufficiency of this pleading the allegation in question must be held equivalent to a direct statement that the sheriff had received a proper statutory undertaking upon the execution of which he had delivered the property levied upon to the claimants.

2. But the real question which the parties present on this appeal is the construction of section 154 of Hill's Code, which is as follows:—

"SEC. 154. The sheriff may deliver any of the property attached to the defendant, or to any other person claiming it, upon his giving a written undertaking therefor, executed by two or more sufficient sureties engaging to redeliver it, or pay the value thereof, to the sheriff to whom execution upon a judgment obtained by the plaintiff in that action may be delivered."

Section 159 of the code provides for *the discharge* of the attachment upon the order of the court or judge, and upon notice to the plaintiff by the execution of an undertaking required by section 160.

The undertaking under that section binds the sureties to pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action.

The appellants' contention is, that the undertaking provided by section 154 is for the benefit solely of the sheriff, and that the security provided for inures, not to the plaintiff, but to the sheriff himself. It is said that it may be more convenient for the sheriff and claimant to act under this section than to keep the property in the custody of the sheriff, especially when the latter is fully protected by a bond taken and approved by himself, and therefore presumably a perfectly satisfactory security to him. In other words, the appellant contends that the authority conferred by this section in question is permissive only, and not mandatory.

The appellants' contention grows out of the use of the word "may" in this section. If that word is used in a permissive sense only, then there is good reason for the plaintiff's contention; but if in this connection it is equivalent to the word "must," then the appellant concedes his position is untenable. It is a general principle in statutory construction that where the word "may" is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in

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the exercise of the power, then the exercise of the power becomes imperative.

In commenting on this subject *Endlich on Interpretation of Statutes*, section 310, says: "But it would be difficult to believe that Parliament ever intended to commit powers to public persons for public purposes, for exercise or non-exercise, in any such spirit. An enactment that a court or person 'may' swear witnesses, or that a justice 'may' issue a summons on complaint of an offense, or the chancellor a commission in a case of bankruptcy, is no mere permission to do such acts, with a corresponding liberty to abstain from doing them. Whenever the act is to be done for the benefit of others, the word 'may,' or any of its equivalents, simply confers a power or capacity to do the act. It is facultative, not permissive; and neither by its own connotation, nor by force of any legal principle, does it necessarily imply an option to abstain from doing the act. On the contrary, it is a legal or rather a constitutional principle that powers given to public functionaries or others for public purposes or the public benefit are always to be exercised when the occasion arises." (*Sedgwick on Statutory and Constitutional Law*, 438; *Potter's Dwarries on Statutes*, p. 220, and note 27.)

And such is the construction of this statute by law-writers and courts. *Waples on Attachments*, page 399, says: "The defendant has the right of bonding the attached property upon offering proper security. The sheriff cannot deny him this right." (*Wheeler v. McDill*, 51 Wis. 356; *Watson v. Kennedy*, 8 La. Ann. 280; *Drake on Attachments*, sec. 313.)

These authorities I think sufficiently show the defendants' or claimants' right to take the attached property into their own possession by a compliance with the statute; and if so, they dispose of the main question relied upon by the appellants.

I think it may be proper to say, also, that the weight of authority seems to be that the execution of the undertaking under this section does not discharge the lien of the attachment. (American and English Encyclopedia of Law, 925, where the whole subject is treated with the learning and research usual with the editors of that excellent and useful publication.)

From what has been said, it is apparent that the complaint fails to state facts sufficient to constitute a cause of action. It does not go far enough to charge upon the defendant a neglect or failure to perform an official duty.

The complaint fails to allege that the sheriff neglected or refused to demand the property or its value from the claimants, who executed the undertaking. In the absence of such allegation, we cannot assume such neglect, nor can we assume that the demand would have been complied with if made. To make the demand after receiving the execution was the limit of the sheriff's duty, and if the same was not complied with, his duty was to return into court a full statement of all of his proceedings. If the defendant or claimant fail to pay the value of the property to the sheriff to whom an execution has been issued on the judgment, or to deliver the property itself to such sheriff upon demand, the plaintiff has a remedy on the undertaking.

Says Waples on Attachment, page 396: "On such a bond, after failure to deliver on demand, if demand is required by the terms, or on failure to deliver for execution without demand when none is requisite, the plaintiff, upon transfer to him by the sheriff, may recover of the principal, or of the surety, the value of the property, provided that the value does not exceed the amount of the judgment, interest, and cost."

But under our system no such transfer is necessary, for the reason the bond by its terms is not made payable to

Points decided.

the sheriff, and being designed for the plaintiff's benefit, he is the real party in interest, and may maintain an action on such undertaking whenever there is a breach.

The judgment of the court below must therefore be affirmed.

LORN, J., being indisposed, did not sit, and took no part in the decision of this case.

THAYER, C. J.—I was very much in doubt at the argument as to what construction should be given the statute in question, but in view of the authorities referred to in the foregoing opinion of Judge Strahan, I am inclined to think that the sheriff is obliged to take an undertaking in such case, when executed with sufficient surety, and that the undertaking is executed for the benefit of the plaintiff in the writ. I therefore concur in the said opinion.

[Filed January 23, 1889.]

MARTHA WOODRUFF ET AL., APPELLANTS, v. THE
COUNTY OF DOUGLAS, RESPONDENT.

APPEAL—NOTICE OF SPECIFICATION OF ERRORS TO BE RELIED UPON IN.—

In an appeal from a judgment of the circuit court to the supreme court, rendered upon a writ of review issued out of the former court, the appellant is required to specify in his notice of appeal the grounds of error with reasonable certainty upon which he intends to rely upon the appeal; but his failure to do so will not preclude the supreme court from examining the transcript and reversing the judgment if it should find that the circuit court had no jurisdiction to render it.

1D.—JURISDICTION TO HEAR.—Specifying the grounds of error in such a case is not essential to give jurisdiction to hear the appeal, but is required in order to inform the adverse party as to the points he will be expected to controvert in the appellate court.

COUNTY COURT—JURISDICTION OF IN ESTABLISHING PUBLIC ROAD.—In order to confer upon a county court jurisdiction to lay out a county road, application by petition must be made to the court, signed by at least

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22 61
21* 49
22* 119
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27 321
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41 561
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twelve householders of the county where the road is laid out, which petition shall specify the place of beginning, the intermediate points, if any, and the place of its termination so definitely and certainly that a person of ordinary intelligence need not mistake their location.

COUNTY ROAD—TERMINAL POINT—DESCRIPTION OF.—Where in an application to a county court to lay out a county road, the terminal point was described in the petition as the point of intersection of the last course with the present C. V. and R. C. road, between the residence of C. L. P. and O. B: *held*, that it did not answer the requirements of the statute in that particular, and consequently did not vest the county court with jurisdiction to lay out and establish the proposed road.

JURISDICTION OF CIRCUIT COURT—WRIT OF REVIEW.—*Held, also*, that the circuit court, upon a writ of review to review the proceedings in laying out and locating the said road under the said application and petition, had no jurisdiction to adjudge that said writ should be dismissed and said proceedings should be in all things affirmed.

APPEAL from the Circuit Court for the county of Douglas.

J. C. Fullerton, for Appellant.

J. W. Hamilton and *W. R. Willis*, for Respondent.

THAYER, C. J.—This appeal is from a judgment of said circuit court affirming proceedings had in the county court for said county in locating a county road.

The appellants claimed that the said county court had no jurisdiction of the said proceedings, and sought to have them annulled by the said circuit court by a writ of review duly issued and returned to the latter court; but that court found that the writ should be dismissed, and the said proceedings should be in all things affirmed, from which decision this appeal was taken.

The appellant is met at the threshold of this court by an objection that his notice of appeal is insufficient to confer jurisdiction upon the court to try any alleged errors in the trial of the case in the said circuit court. Respondent claims that the notice of appeal should have specified the grounds of error with reasonable certainty

upon which the appellant intended to rely on the appeal.

The Civil Code, section 591, provides that an appeal from the judgment of the circuit court on review may be taken to the supreme court in like manner and with like effect as from a judgment of such circuit court in an action; and section 537 of the Civil Code requires that the appellant shall cause a notice to be served on the adverse party, and file the original, with proof of service indorsed thereon, with the clerk where the judgment is entered, and that such notice, in case the judgment be one rendered in an action at law, shall specify the grounds of error with reasonable certainty upon which the appellant intends to rely upon the appeal.

These two provisions, taken together, would probably require that the notice of appeal to the supreme court from a judgment on the circuit court on review should specify the grounds of error upon which the appellant intended to rely on the appeal, although there is much less reason for requiring it in such a case than in an appeal from a judgment in an action, as the petition for the writ of review is required to set forth the errors alleged to have been committed, and the appeal to the supreme court from the judgment rendered on review is really nothing more than a new trial of the questions determined in the circuit court. The object in requiring the notice of appeal to specify the grounds of error upon which the appellant intends to rely on the appeal evidently was for the purpose of informing the adverse party as to the points which he would be required to controvert in the appellate court. But what grounds of error an appellant can specify in a notice of appeal from a judgment on review more than that the judgment is erroneous I am unable to comprehend. I cannot see that he can specify anything as error further than that the court had decided wrong. The

alleged errors set forth in the petition for the writ are the only matters which this court can ordinarily consider; and there would certainly be no necessity of pointing them out, as they are already a part of the record. All that can possibly be required in such a case is a specification of what was known in the assignment of errors upon a writ of error as common error in law, as distinguished from special error.

The common errors were, that the declarations were insufficient in law to maintain the action, or that the judgment was rendered for the plaintiff instead of the defendant, or *vice versa*. (2 Tidd's Practice, 1169.)

But whether it is essential to specify any error whatever in order to authorize this court to examine the transcript, and to determine as to the judgment being erroneous, is very questionable. That a notice of appeal which fails to specify the ground of error relied upon is a nullity, I am very much inclined to doubt. Such might be the result if no error whatever, except those actually specified in the notice of appeal, could be considered in this court; but its rulings have been otherwise. It has repeatedly held that where the error goes to the jurisdiction of the court, and it appears from the face of the record, the court is bound to take judicial notice of it, although not specified, or any mention made of it in the argument; that if the want of jurisdiction appeared to the judge before whom the proceeding was had, at any stage, he would, of his own notion, have dismissed the cause, and this court on appeal stands in the same position. (*State of Oregon v. McKinnon*, 8 Or. 487.)

The same rule has been maintained where the complaint does not state facts sufficient to constitute a cause of action or suit. (*McKay v. Freeman*, 6 Or. 453.)

If this court is not precluded from considering every ground of error which the notice of appeal from a judg-

ment of the circuit court in an action at law fails to specify as such, then I infer that such specification is not essential to confer jurisdiction upon it to hear the appeal.

No one can consistently, it seems to me, contend that the court would have the right to consider a question of jurisdiction or the sufficiency of the complaint because the appellant specified in his notice of appeal some other ground of error, when it would not have it if such ground of error were not specified.

To hold that the court has jurisdiction to consider the grounds of error referred to, although not specified in the notice of appeal, but has it because the notice of appeal specifies some other grounds of error, however untenable such other ground may be, would be adhering too strongly to a nicety.

There is nothing in the language of the code that I can discover which requires a specification of the grounds of error in the notice of appeal as a condition upon which the appeal is taken, although it is mandatory in its character. Such a specification is somewhat analagous to the assignment of errors upon a writ of error.

The two modes of proceeding are very different in most respects, yet some traces of the former procedure remain; and as the legislature adopted the code in order to make a change in the former practice, we should consider them both in construing the later system.

The issuance and service of the writ of error, and the giving to the adverse party notice of its test, return, and the court in which it was returnable, and the certifying of the proceedings to the appellate court, invested that court with complete jurisdiction over the case. Errors were then assigned by the plaintiff, and a rule entered that the defendant join in error. It was, however, a distinct proceeding, and took place when the record had been certified to the court out of which the writ issued; while under the

code it is combined with the notice of appeal, which occupies the place of the writ.

Under the former procedure, judgment of *non prosecutur*, or *non pros.*, as it was usually termed, might be entered against the plaintiff in the writ if he failed to assign errors within the time limited by the rule for assigning them; and under the code, the appeal doubtless may be dismissed if the appellant fails to specify the grounds of error in the notice; and I cannot understand how the jurisdiction of the appellate court depends any more upon the fact that the notice of appeal specifies the grounds of error under the present practice than the jurisdiction of the court which issued the writ of error depended upon the fact of the plaintiff's assigning error under the former practice. The dismissal of an appeal by the appellate court for the cause mentioned is not upon the grounds that the court has no jurisdiction of the appeal, but for the reason that the appellant failed to inform the adverse party as to the grounds of error upon which he intended to rely upon the appeal, as the code requires him to do. But it does not follow that because the court may dismiss the appeal in such case, it will do so when the record discloses an inherent infirmity in the judgment or other determination appealed from.

In *Crandall v. State*, 10 Conn. 370, 371, Williams, J., in commenting upon a similar practice, says: "The rule admits of a construction which will effectuate its objects, and yet not cripple the court. The plaintiff shall not be heard to allege any cause he has not assigned. This will be a sufficient inducement for him to point out every cause on which he relies. At the same time, if the court should see or believe that some other defect existed, the rule would not prevent them from calling on the defendant in error to remove the objections which had occurred

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to them, nor the court from deciding upon the objection if it could not be obviated.”

If the respondent in this case had filed a motion to dismiss the appeal upon the grounds referred to, and the appellant had suggested that the circuit court had no jurisdiction to render the judgment appealed from, it would have been the duty of the court, it seems to me, to look into the record, and ascertain whether such were the facts or not. The respondent could have had no well-founded objection to such a course being pursued. The judgment appealed from was here for revision, and the respondent not having had notice that the appellant would rely upon such ground of error availed nothing. It is the duty of the party in whose favor an adjudication has been made to be prepared to defend it whenever its validity is assailed for want of jurisdiction.

The case has been argued and submitted upon its merits, and I think it is the duty of this court to examine it with a view of ascertaining whether the circuit court had jurisdiction to render the judgment appealed from.

The effect of the judgment was to affirm the proceedings of the said county court in locating the county road referred to. The code provides that the court, upon the review, shall have power to affirm, modify, reverse, or annul the decision or determination reviewed. (Code, sec. 591.) Hence the said judgment must have been given under one of these powers, and it necessarily was the exercise of the first one, as its terms are not applicable to either of the others.

Whether, therefore, the circuit court had jurisdiction or not to affirm the said proceedings depends upon the county court having had jurisdiction to locate the said road; for if the county court acted without jurisdiction in the matter, then the circuit court had no power to affirm its acts.

The circuit court, having power to review the proceedings of the county court, did not authorize the former to approve them to any greater extent than the latter had authority to enact them originally. It is said that the court has jurisdiction to decide wrong as well as right, but no court has power to deprive a person of his property unlawfully, nor to sanction an attempt of that character. The appellant's counsel claims that the said county court acted without jurisdiction in locating the road and ordering it opened, for several reasons; the main one of which is, that the petition for the location of the road did not specify its beginning, its intermediate points, nor its place of termination.

The petition prays for the laying out and locating of a county road, commencing at the terminus of the present county road at a certain point, running thence westerly to a point near to and south of the house of N. T. Day, thence southwesterly to a point on the Umpqua River, above the Emmett or Day ford, thence up said river to Emery's Ferry, thence across said river, thence up said river as near as practicable thereto through the donation claim of S. D. Evans, and thence up said river to the said donation claim of Jonathan Woodruff, thence westerly on the right-hand side of the orchard on the said premises, thence in a southwesterly course to a point a few rods west of the quarter-section post between sections 13 and 24, township 26 south, range 7 west, thence southwest to the present county road leading from Cole's Valley to Looking Glass, thence southerly on said county road to a small branch just south of the McKinney house, thence running southeast over the present traveled gateway road over the premises of George W. Alderson to the lower side of the county poor-farm, where the present gateway road strikes the fence of said poor-farm, thence southerly up said fence, leaving the orchard to the left

under the bluff, and to the premises of Mr. Archambeau, about one hundred yards from said river, thence southwest above said Archambeau's barn, westerly to the premises of Joseph Champagne, on the most practicable route, and through the premises of the said Champagne, leaving his house to the left, and intersecting the present Cole's Valley and Roseburg County road at a point between the residence of Charles La Point and O'Brien.

The statute provides that all applications for laying out, altering, or locating county roads shall be by petition, etc., which petition shall specify "the place of beginning, the intermediate points, if any, and the place of termination of the road." These are essential matters in the initiation of such a proceeding. The beginning, the intermediate points, and place of termination of the proposed road must be certain, otherwise the county court will not acquire jurisdiction to lay out or locate it.

In *Johns v. Marion County*, 4 Or. 46, this court held that a petition for the alteration of a road which did not describe the terminal points with certainty was insufficient to give the county court jurisdiction, and that view has been adhered to ever since. In that case the last course and terminal point were described as "thence southerly, to intersect the county road near the foot of the Nevil Hill, near the south line of John A. John's land claim," and the court held it insufficient.

In the present case, the last course and terminal point are described as follows: "Thence southwest above said Archambeau's barn, westerly to the premises of Joseph Champagne, on the most practicable route, and through the premises of the said Champagne, leaving his house to the left, and intersecting the present Cole's Valley and Roseburg County road at a point between the residence of Charles La Point and O'Brien."

It requires no argument to prove that this description

wholly fails to designate the particular point of termination of the proposed road. It is intended to end somewhere on the Cole's Valley and Roseburg County road between the two residences mentioned, but at what precise place is unknown. Such a description does not answer the requirements of the statute. A county road cannot be laid out unless the petitioners have in mind the distinct points referred to, and so designate them in their petition that a person of ordinary intelligence need not mistake their location. A variance of a few feet in any of the points required by the statute to be certain would be likely to create serious objections to the location of the road; but however that might be, the statute has prescribed the terms and conditions upon which private property can be subjected to a public easement or servitude, and it must be strictly followed, otherwise the proceedings will be a nullity.

The appellant's counsel contends also that the proceedings of the county court in attempting to locate the said road were irregular in several respects, but under the view taken of the petition, it will not be necessary to consider the irregularities claimed. The petition is clearly defective in the particulars mentioned, and the county court obtained no jurisdiction of the matter.

Counsel for the respondent insists, however, that as the appellants filed in the county court their claim for damages for the location of the road through their premises, as provided by statute, and appealed from the assessment of damages determined by the viewers to the said circuit court, it estopped them from contesting the validity of the road,—that it operated as a dedication of the premises as a public highway.

The same point was presented in *Johns v. Marion County*, 4 Or. 46. The court there said: "The question is raised whether the appellant, who filed a claim upon which

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damages were awarded in his favor by the county court, can object to the jurisdiction. If he received and accepted the award, the proposition would be of more force. His disability to make the objection must be either because it would be inequitable to permit him to allege the truth, or because by his action in the county court jurisdiction was acquired. It will not be claimed that he is estopped, he not having accepted the award, and personal appearance in a case of this kind does not confer jurisdiction."

I think that holding was entirely correct. The proceeding to have the damages assessed is distinct from that of review; and unless the party accepted and received damages on account of the opening of the road, he should not be estopped from questioning the jurisdiction of the county court to establish it; at least the mere pendency of the appeal in such case will not bar or abate the remedy by writ of review. That condition of things existed in *Thompson v. Multnomah County*, 2 Or. 34, but neither the court nor the counsel deemed it of sufficient importance to notice it in the argument or decision.

I am of the opinion for the reasons herein expressed that the judgment of the circuit court appealed from should be reversed, and that the proceedings of the said county court had in regard to the laying out and opening of the said road should be annulled.

LORD, J., concurred, and STRAHAN, J., expressed no opinion.

Opinion of the Court.

[Filed January 29, 1889.]

JOHN KLOSTERMAN, APPELLANT, v. J. W. HAYES
ET AL., RESPONDENTS.

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PARTNERSHIP — WHAT IS — SURETY — INDEMNITY OF. — Where H., party of the first part, and J. and others, parties of the second part, entered into written articles of agreement, which provided, in substance, that the first party should buy and manage a store, warehouse, and other business at a certain place for the benefit of the public and of the second parties; that in return therefor the second parties should become security for the stock of goods and warehouse rent until the goods were paid for; that the goods and storehouse should not be considered the property of the first party until the goods were paid for, but simply held in trust by the first party for the second parties; that the second parties should have the right to appoint a qualified person to assist in the management of the business; that the first party should only draw out of the business current living expenses, and should make a report every thirty days to the second parties of the condition of the business; that the stock should be kept up to what the trade required, and of the receipts of the business; and that the remainder of the receipts should be applied upon the principal and interest of the debt; which agreement concluded with a provision that a failure to comply should forfeit all interest in the firm; that the name of the firm should be H. & Co.: *held*, that the language of the agreement, taken by itself, did not indicate that the parties intended to form a partnership; but only indicated that the second parties intended to become security for the first party for the stock of goods and for the rent of the warehouse, and to hold a claim upon the property as an indemnity against loss in consequence thereof.

APPEAL from the Circuit Court for the county of Wasco.

Mays & Huntington and *H. Y. Thompson*, for Appellant.

Bennett & Wilson and *J. E. Atwater*, for Respondent.

By the COURT.—This appeal is from a judgment rendered in an action brought by the appellant against the respondent in said circuit court, to recover the amount of a promissory note executed by the respondent Hayes to the appellant. The note was given for goods purchased from time to time from the appellant by said Hayes to supply a certain store situated at Biggs's Station, in said county

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of Wasco, of which he had the charge and management. The other respondents were sought to be made liable with Hayes for the payment of the said note, upon the ground that they were partners with him in the said store, under the firm name of J. W. Hayes & Co. The main ground of the contention was, whether or not said partnership existed, and whether or not the said respondents had held themselves out as partners in such a way as to make them liable to third persons dealing with Hayes. One of the respondents was not served with summons, and did not appear in the action. Hayes suffered a default to be taken against him, but the respondents who were served appeared and filed an answer denying the partnership. Upon the trial the appellant introduced in evidence an instrument in writing, signed by the said Hayes and the respondents, of which the following is a copy:—

“Articles of agreement between J. W. Hayes, of the first part, and J. H. Jenkins, William Hickinbotham, Nathan Morris, A. W. Stark, P. E. Price, John Graham, E. C. Helmer, P. E. Mitchell, of the second part,—

“Witnesseth: I, J. W. Hayes, of the first part, agree to buy and run a store, warehouse, telegraph office, and railroad agency for the benefit of the public, parties of the second part, at Biggs, Oregon.

“In return for the above services, we of the second part agree to become security for the stock of goods and warehouse rent until such goods are paid for, for the first-named; that goods or house are not to be considered as the property of the party of the first part until paid for, but simply held in trust by him for the parties of the second part. Parties of the second part reserve the right to appoint any man they may choose as assistant of party of the first part, to assist him in handling said business, provided party appointed by party of second part has sufficient qualifications to conduct the business; party of the first part

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reserving the right to accept or refuse such appointments until such suitable man as heretofore described has been appointed; party of the first part reserving the right to select and employ any assistant he may choose in order to post him in the business, and arrange stock to advantage. After that time, party of the second part has the right to appoint such assistant. Party of the first part is to have current and living expenses out of the stock only. No salary to be paid to party of the first part. I of the first part will make a report every thirty days to my security; the amount of business done, showing an itemized account of the business, cash received and disbursed. The stock shall be kept up to what the trade requires out of the receipts, and the remainder to be applied upon principal and interest of the debt. Any question that may arise between parties of the first part and parties of the second part to be settled by arbitration. This agreement to be substituted by one made at earliest possible convenience, and all changes desired, providing agreeable to both parties. Failure to comply will forfeit all interest in this firm. The name of the firm will be J. W. Hayes & Co.

[Signed]

"J. W. HAYES, of the first part.

"JAMES H. JENKINS.

"WILLIAM HICKINBOTHAM.

"NATHAN MORRIS.

"P. E. MITCHELL."

It was shown in proof that at the time of the purchase of the goods for which the note was given, said instrument was exhibited to the agent of the appellant, who sold the goods to Hayes as J. W. Hayes & Co., and the note before referred to was signed "J. W. Hayes & Co."

At the trial, after the evidence was closed, the circuit court instructed the jury that, in order to recover in the case, it was necessary for the appellant to show that Mor-

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ris, Hickinbotham, Jenkins, and Mitchell were all partners with Hayes in the alleged business; and as there was no evidence in the case tending to prove that Morris was a partner, that they should find for the respondents; and the jury having found accordingly, the judgment from which this appeal is taken was entered upon the verdict.

The said instruction was excepted to by the appellant's counsel, and the counsel for the respondents now concedes that it was error. Nothing would remain, therefore, but to reverse the judgment, and send the case back for a new trial, if it were not necessary to construe the written instrument above set out. Counsel for the respondents request us to do that, and as the instrument will be an important matter upon the new trial, we deem it proper to give our views regarding its legal effect. The object which the parties had in view evidently was to establish a store and other kinds of business at the place designated in the writing. They supposed, no doubt, that the business would be convenient and beneficial to the neighborhood and to themselves, and they were willing to make a joint effort to give it a standing. Hayes, the party of the first part, was to buy the outfit and have general management of the affair, and the parties of the second part were to back him to the extent of becoming security for the stock of goods and rent of the warehouse until the goods were paid for. The property was not to be considered the property of Hayes until paid for, and during the intermediate time it was to be regarded as held in trust by him for the parties of the second part. The parties of the second part reserved the right to appoint a suitable person to assist in the business, and the party of the first part was only to draw out of it his current living expenses. He was to make a report every thirty days to the parties of the second part as to the condition of the business; was to keep up the stock to what the trade required out

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of the receipts of the business, and the remainder was to be applied upon principal and interest of the debt. In attempting to ascertain the intention of the parties to the written instrument, the court is not aided by a knowledge of the facts and circumstances surrounding the transaction. It is possible that they are of such a character as would materially influence its determination as to what the parties really intended by the writing. Its language, however, taken by itself, does not indicate that the parties intended to form a partnership. It shows no community of interest between the parties as to profits and losses in the business; but shows that the parties of the second part intended to loan their credit to Hayes, in order to enable him to establish himself in a business from which they would derive an indirect benefit. They seem to have intended to become security for a stock of goods and rent of warehouse, and to hold a claim upon the property as an indemnity against loss, in consequence thereof. It might be inferred from the last paragraph in the writing that the parties to it regarded themselves a partnership firm; but when read in connection with the other parts of the writing, it is plain that they failed to create by it such a firm. How the business was in fact conducted after the execution of the writing we have no means of knowing. The parties may have held themselves out to the world as partners, and thereby have made themselves liable to third persons dealing with Hayes, but that question is not before us, and our opinion as to the legal construction of the writing does not affect it.

The judgment appealed from will be reversed, and the case remanded for a new trial.

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[Filed February 4, 1889.]

**J. K. KELLEY, RESPONDENT, v. HORATIO N. PIKE,
APPELLANT.**

APPEAL — WHEN TRANSCRIPT MUST BE FILED — EXTENSION OF TIME FOR FILING. — In an appeal from a circuit court to the supreme court, the transcript of the cause must, by the second day of the next regular term of the supreme court after the appeal is perfected, be filed with the clerk thereof, in order to confer jurisdiction upon the latter court. The circuit court, or judge thereof, or the supreme court, may, upon notice to the respondent, and upon such terms as may be just, by order enlarge the time for filing the transcript; but such order can only be made within the time allowed to file the transcript, and cannot extend the time of filing beyond the term of the appellate court next following the appeal.

TRANSCRIPT — EFFECT OF NOT FILING IN THE TIME ALLOWED BY LAW. — Where P. perfected an appeal to the supreme court from a circuit court, but failed to file his transcript as provided by the code: *held*, that the court had no jurisdiction to grant an order allowing the transcript to be filed *nunc pro tunc*, whatever the reasons may have been occasioning the neglect.

MOTION for leave to file transcript upon an appeal from the Circuit Court for the county of Wasco.

G. G. Bingham and *W. L. Bradshaw*, for the motion.

No counsel appeared in opposition.

The Court. — The appeal herein was taken prior to the commencement of the present term of this court, but the transcript was not filed by the second day thereof, as required by the code. The neglect was in consequence of the sickness and death of the appellant's attorney, who took the appeal. The appellant's counsel now move for an order allowing the transcript to be filed *nunc pro tunc*. The grounds upon which the motion is made are sufficient to excuse the neglect, and the court would very readily grant the motion if empowered to do so.

The appellant's counsel suggest that section 102 of the code, which provides that the court may allow an answer

17	330
24	440
30*	685
33*	983
17	330
127	75

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or reply to be made or other act to be done after the time limited by the code, or by an order enlarge such time, authorizes the court to permit any act to be done after the time has elapsed in which it is required to have been done.

For the purposes of this case, we would be glad to adopt the view suggested, but an appeal from the circuit court to this court, under our system of practice, is a new proceeding, and the requisite steps must be taken to give the appellate court jurisdiction, as may be seen by reference to other provisions of the code. Section 541 provides that "upon the appeal being perfected, the appellant must by the second day of the next regular term of the appellate court thereafter file with the clerk of such court the transcript of the cause, as provided in this section, and thereafter the appellate court has jurisdiction of the cause, and not otherwise."

Subdivision 3 of said section provides that "if the transcript is not filed with the appellate court within the time provided, the appeal is to be deemed abandoned, and the effect thereof terminates; but the court or judge thereof may, upon notice to the respondent, and such terms as may be just, by order enlarge the time for filing the same; but such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal."

In view of the latter provision, this court would hardly undertake to hold that it had authority after the expiration of the time there specified to enlarge the time for filing the transcript. A court cannot create jurisdiction for itself; it must be conferred by law, and the mode pointed out whereby it may be acquired must be substantially complied with, in order to obtain it. We would have as much right to enlarge the time for the service of the notice of appeal as we would to enlarge the time for

Points decided.

filing the transcript after the time specified in the code had expired. It would be extrajudicial in either case. A party desiring to have an adjudication of a circuit court reviewed in this court must by the second day of the next regular term thereafter file with the clerk of this court a transcript of the cause, otherwise his appeal will be deemed abandoned and the effect terminated. The court or judge thereof, however, may, upon notice to the respondent, and upon such terms as may be just, by order enlarge the time for filing the same, as before mentioned.

Under no other circumstances can the transcript be filed in this court so as to give it jurisdiction of the cause. And in our opinion such order should be obtained from the court, or judge thereof, in which the decision appealed from was rendered, although this court has held that it had authority to make such order, and will probably adhere to that ruling when a case is properly presented. It is important for the members of the bar to bear in mind that an order of that kind cannot be made except upon notice to the respondent.

The motion must be denied.

[Filed February 4, 1889.]

THE STATE OF OREGON, RESPONDENT, v. PATRICK MCGINNIS, APPELLANT.

APPEAL — PRACTICE IN SUPREME COURT. — Upon an appeal to this court, the judgment will be affirmed without looking into the record, if the appellant's counsel fail to appear or file a brief.

CAPITAL CASE. — But where the penalty is death, this court will look into the record to ascertain if any prejudicial error intervened during the progress of the trial, whether there is an appearance or not.

NO BILL OF EXCEPTIONS. — In a criminal case where the indictment is sufficient, and the judgment is in due form, and there is no bill of exceptions, and nothing in the record showing error, no question is presented for review upon the appeal.

17	332
20	335
20*	332
25*	339

Opinion of the Court—Strahan, J.

AFFIDAVITS — NO PART OF THE RECORD. — Affidavits used in the court below, upon a motion for a new trial, constitute no part of the record, and cannot be considered on the appeal.

APPEAL from Grant County.

No counsel appeared for Appellant.

G. G. Bingham, for the state.

STRAHAN, J.—Upon the trial in the court below, the defendant was convicted of murder in the first degree, and sentenced to the extreme penalty of the law, from which he has appealed to this court, but his attorney failed to file a brief in the cause or to appear upon the hearing. Under such circumstances, the rule of practice in this court is to affirm the judgment without looking into the transcript. (*Tucker v. Constable*, 16 Or. 239.) But inasmuch as this is a capital case, we have felt it to be our duty to examine the record to ascertain if there was any ground whatever for the appeal, or any error committed in the court below prejudicial to the defendant. Upon looking into the record, we find there is no bill of exceptions. The indictment is sufficient, and the judgment is in due form, and no error appears in the record. There is therefore no question presented that we could review or consider. There are some affidavits filed tending to show that during the trial the defendant was manacled, and some others tending to controvert the fact, except after his conviction, and then only because he was desperate and dangerous, and the officers considered it necessary for his safe-keeping. But the question of fact cannot be tried in this court on affidavit.

If during the trial in the court below anything was done or suffered by the court which the defendant deemed was prejudicial to him, it was his right to object to it, and if his objections were overruled, to preserve a record

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of the action and ruling of the court by bill of exceptions, and then this court would be able to say whether the court erred in its rulings or not. Unless the matter complained of appears in the judgment roll itself, the action of the trial court in a criminal case can only be reviewed on bill of exceptions.

It follows that the judgment appealed from must be affirmed.

[Filed February 11, 1889.]

J. W. BATCHELLOR, RESPONDENT, v. S. T. RICHARDSON ET AL., APPELLANTS.

A PARTY, IN ORDER TO ESTABLISH TITLE TO A DEBT under proceedings in garnishment upon execution, must show that a levy was made by virtue of the execution upon the debt, and that the law relating to such proceedings had been strictly complied with.

WHERE A GARNISHEE FURNISHES A SHERIFF to whom a writ of execution has been issued a certificate as to any indebtedness owing by him to the defendant in the writ, the plaintiff therein, if not satisfied with the certificate, may apply to the court, or judge thereof, where the action is pending for an order requiring the garnishee to appear and be examined on oath concerning the same; and if the plaintiff fail to pursue that course, he will be deemed to have accepted the certificate as true, and will not be permitted to question the statement contained therein. And where a garnishee furnished such certificate, and before any subsequent proceedings were had in the matter, furnished a second one, to correct a supposed mistake in the first, which the sheriff received and made a part of his return of the proceedings had on the execution. *Held*, that the plaintiff had no right to attempt a sale of the debt, when it appeared from the second certificate that the debt had been assigned by the defendant in the writ to a third person.

WHERE W. M. D. EXECUTED TO M. D. CERTAIN PROMISSORY NOTES, and a mortgage upon real property to secure their payment, and B. subsequently commenced a suit to foreclose the said mortgage, alleging an assignment of the notes and mortgage by M. D. to him; and R. and S. claiming that by virtue of an execution upon a judgment against M. D. in favor of one M., and of proceedings of garnishment had thereon, they became owners of the debt evidenced by the notes, and having been made parties defendant to the foreclosure suit by order of the court, and filed

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an answer therein, in which they alleged that the assignment of the notes by M. D. to B. was done with an intent to defraud the creditors of the former, but did not allege that the execution was levied upon the said debt, nor prove that such levy was made; and it further appearing that W. M. D., when the sheriff, with the writ of execution against M. D., applied to him for the purpose of levying upon said debt, furnished the sheriff with a certificate, from which it appeared that he was owing said M. D. the said debt, but afterwards, and before any subsequent proceedings were had in the matter, furnished the sheriff a second certificate, to correct a supposed mistake in the first one, and from which it appeared that prior to the application of the sheriff to him with the writ of execution, the said M. D. had assigned the debt to B., and the said sheriff received the second certificate and made it a part of his return of the proceedings had on the execution, yet notwithstanding he proceeded, at the instance of M., to sell the said debt upon the execution at sheriff's sale, and R. and S. purchased it at such sale: *held*, that they acquired no title thereby to the debt, and had no sufficient standing in court to impeach the *bona fides* of the assignment from M. D. to B.

APPEAL from the Circuit Court for the county of Marion.

Stott, Waldo, Smith, Stott, & Boise, for J. W. Batchellor.

W. M. Kaiser, for Appellants.

THAYER, C. J.—This appeal is from a decree rendered by the said circuit court in a suit brought by the respondent against William M. Davis, Mary Davis, and T. W. Rutherford, to foreclose a mortgage executed by William M. Davis on the twenty-fourth day of September, 1885, to secure the payment of three non-negotiable promissory notes executed by the said William M. Davis to the said Mary Davis, amounting to two thousand dollars, and claimed by the respondent to have been assigned to him by the said Mary Davis on the twelfth day of January, 1886. Two of the said notes were for the sum of five hundred dollars each, and became due respectively on the first day of December, 1885, and one the first day of December, 1886. The other note was for one thousand dollars, and became due on the first day of December, 1887.

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The latter note drew interest at the rate of ten per cent per annum; the other two were to draw no interest until after maturity. The said T. W. Rutherford was made a party defendant in the suit, in order to foreclose a lien he had or claimed to have upon the mortgaged premises.

Neither of the Davises nor said Rutherford filed any answer to the suit, but the said appellants, after it was commenced, obtained leave of the court to be made parties defendant therein, and thereupon filed an answer, in which they alleged that the assignment of the notes by Mary Davis to the respondent was made to hinder and delay her creditors, particularly the appellants, which fact the respondent knew at and before said assignment was made to him. They further alleged in said answer that one E. W. McCann, on the thirty-first day of December, 1885, commenced an action in said circuit court against the said William M. Davis and Mary Davis for the recovery of money; that on the seventh day of January, 1886, the summons was duly served upon the said Mary Davis in person, and that on the twelfth day of January, 1886, she made the said assignment for the purposes mentioned; that it was made without any consideration whatever; that on the eighth day of February, 1886, said McCann obtained a judgment in said circuit court against said Mary Davis for \$1,191.25, and costs taxed at \$21.95; that on the ninth day of February, 1886, an execution was issued on said judgment, and delivered to the sheriff of Marion County; that on the same day said sheriff served the said execution on said William M. Davis, who on the same day gave said sheriff a certificate, in which he acknowledged that he was owing a balance of \$150 on the first-mentioned promissory note, and the whole of the other two notes, set out in the complaint in the suit, "the first note" being the one due December 1, 1885; that said notes were not negotiable, and that he had re-

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ceived no notice of their assignment, and that they were secured by the said mortgage; that on said certificate said sheriff duly advertised and sold at public auction said promissory notes and indebtedness, on the twenty-sixth day of March, 1886, to the appellants for the sum of twenty dollars, and that they were the owners and holders thereof, and that there was due and owing to them thereon \$150 and interest on the first note, and the whole amount of the two other notes and interest; and whereupon the appellants prayed a decree dismissing the respondent's suit, and declaring the said assignment of said notes to him void. They also prayed a foreclosure of the mortgage, the sale of the mortgaged premises, and that the proceeds thereof be applied to the payment of the said indebtedness to them. The respondent filed a reply to the said answer, denying all the material allegations therein contained.

After the issues were so made, a large amount of evidence was taken, consisting of writings and oral testimony. The writings refer generally to the proceedings had upon the said execution, and the testimony was taken mainly to show that the assignment of the notes by Mary Davis to the respondent was done with intent to hinder, delay, and defraud her creditors.

The said circuit court heard the case upon the allegations and proofs of the parties, and found, as conclusions of law, from the facts found by the court, that the respondent was the legal owner of said notes; that the alleged sale of the notes by the sheriff to the appellants gave them no title or interest in the notes or the debt secured thereby, and that the respondent was entitled to a decree against said William M. Davis for the amount due on the notes, and for the foreclosure of the mortgage, upon which findings the decree appealed from was en-

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tered. It occurred to me upon the argument of this case that the appellants were not properly in court.

I was under the impression that the question of their ownership of the notes and mortgage should be settled before an attempt was made to foreclose the mortgage, and should have been done either by a contest for their possession, or by some proceeding in the nature of an interpleader, and I think now that it would have been more regular if the said William M. Davis had filed a pleading of that character in the suit, and had the question of such ownership determined in the outset. But the authorities seem to hold in such cases that a plaintiff has a right to make a contesting owner of the mortgage sought to be foreclosed a party defendant in the foreclosure suit and have his claim decided therein, consequently the court, in this case, had a right, under section 41 of the code, to cause the appellants to be brought in and made defendants, as was done.

The circuit court does not appear to have based its conclusions of law, "that the pretended sale of the notes by the sheriff to appellants gave them no title or interest in the notes or debt secured thereby," upon any particular fact. It found that McCann recovered the judgment against the said Mary Davis, the issuance of an execution on the judgment, its service on William M. Davis, with a notice that the said notes were levied on as the property of Mary Davis to satisfy the judgment; that said William M. Davis gave to the sheriff the certificate that he was owing said Mary Davis the said notes, less \$350 paid on the first note, and a sale of the notes under the execution to the appellants, as alleged in their answer.

The court also found, and the fact appears from the evidence, that the said William M. Davis, after giving said sheriff the said certificate of February 9, 1886, gave him, on the eleventh day of March, 1886, an amended

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certificate, in which he stated that he was not correct in his first certificate, and that since making the same he had learned that said notes and mortgage had been assigned to J. W. Batchellor, the plaintiff therein, and that he was not at the time of the service of execution and notice indebted to said Mary Davis on said notes.

The said court stated as a fact, in the last paragraph of the ninth finding of fact, after stating that the sheriff proceeded to sell at public auction said notes, etc., the following: "Said sheriff never having possession of said note or other authority to sell the same than as appears from the facts stated above."

It would seem from this statement that the said court attached importance to the fact that the sheriff did not have possession of the notes at the time he sold them under the execution; but whether the court based its said conclusion of law upon such fact, or upon the fact of the amended certificate, or upon some other fact, is left entirely to conjecture. It certainly was not based upon any finding that the assignment of the notes by Mary Davis to respondent was made in good faith, as the court states in its conclusions of law that, it being considered by the court that the pretended sale of said notes by the sheriff to appellants was unauthorized by law, it makes no findings relative to the alleged fraud in said assignment. Such a finding was unnecessary, of course, unless it were shown that the appellants had, by their proceedings of garnishment, succeeded to the title of the notes and mortgage; but it would have been more satisfactory if the circuit court had pointed out wherein those proceedings were defective, and failed to transfer the title of the notes to the appellants. McCann had a right to have an execution issued upon his judgment against Mary Davis, and to have it levied upon any debt owing to her by William M. Davis, and to have it satisfied out of such

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debt. The code points out the mode of procedure in such cases.

Subdivision 4 of section 283 provides as follows: Property shall be levied on (by writ of execution) in like manner and with like effect as similar property is attached as provided in sections 149 and 152, omitting the filing of the certificate provided for in section 151.

Subdivision 3 of said section 149 provides that personal property not capable of manual delivery shall be attached by leaving a certified copy of the writ, if it be a debt, with the debtor.

Said section 152 provides that whenever the sheriff with a writ of attachment against the defendant shall apply to any person, etc., mentioned in subdivision 3, section 149, for the purpose of attaching any property mentioned therein, such person, etc., shall furnish him with a certificate designating the amount and description of the debt owing to the defendant. If such person, etc., refuse to do so, or if the certificate, when given, be unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending to appear before him and be examined on oath concerning the same, and disobedience to such order may be punished as contempt.

Section 284 provides that in the case of property in the possession of or owing from any garnishee mentioned in section 152, the sheriff shall proceed as follows: If it appears from the certificate of the garnishee that he is owing a debt to the judgment debtor which is then due, if such debt is not paid by such garnishee to the sheriff on demand, he shall levy on the property of the garnishee for the amount thereof, in all respects as if the execution was against the property of the garnishee. But if such debt be not then due, the sheriff shall sell the same according to the certificate as other property.

If the proceedings of garnishment under which the appellants claim title to the notes conform to the various provisions of the statute above set out, then the appellants gained a standing that would enable them to question the good faith of the assignment of the notes by Mary Davis to the respondent, otherwise it would not matter, as far as this case is concerned, as to what intent said assignment was made with.

It is an inflexible rule of law that title to property cannot be divested out of one person, and invested in another, by proceedings *in invitum*, unless such proceedings are strictly complied with.

The appellants, therefore, in order to maintain that the title to the notes in question was divested out of Mary Davis, and that they succeeded to it, had to allege and prove that E. W. McCann recovered a valid judgment against her; that a regular execution was issued thereon; that the sheriff, by virtue thereof, levied upon the debt evidenced by the said notes by leaving a certified copy of the writ, and a notice specifying the property levied upon, with William M. Davis; that the said Davis furnished the sheriff with a certificate designating the amount and description of the debt owing by him to the said Mary Davis; that it appeared from such certificate that said William M. Davis was owing said debt to said Mary Davis, and that the same was not then due.

That the judgment was duly rendered, and the execution regularly issued, there is no contention; but that the allegation of the levy upon the debt is sufficient is very doubtful. Said allegation is as follows: "And on the ninth day of February, 1886, said sheriff duly levied and served the said execution on William M. Davis, one of the defendants in this suit, and said William M. Davis, on said ninth day of February, 1886, gave said sheriff a certificate, in which," etc.; when the allegation should have

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been that the sheriff, by virtue of the said writ of execution, levied upon the said debt by leaving a certified copy of the said writ, and a notice specifying that he levied upon the said debt, with the said William M. Davis. Nor, in my opinion, does the certificate of return of the said execution by the said sheriff show that the execution was legally levied upon the said debt.

Said sheriff certified in said return that he received the execution on the ninth day of February, 1886, and levied and served the same within said state and county on William M. Davis, by delivering to said William M. Davis, in person and personally, a true copy thereof, prepared and certified by him as sheriff, together with a notice specifying the property levied on, and requiring the said William M. Davis to furnish him a certificate designating the amount and description and character of such debt owing from said William M. Davis to said defendant Mary Davis.

The sheriff does not certify in his return of the execution that he levied upon any property whatever. He states therein that he served the execution on William M. Davis, and that he specified in the notice which he delivered to him the property levied upon, but what property he did levy upon is not shown.

It might have been, for anything appearing to the contrary in the return, tangible property. His return should have contained the words of the notice relating to the property levied upon, and not its general purport.

In *O'Brien v. Merchants' and Traders' Fire Ins. Co.*, 56 N. Y. 52, the court of appeals, in construing a similar provision of statute, held that a general notice by the sheriff that he attaches all property, debts, etc., belonging or owing to the defendant in the attachment suit, in the possession or under the control of the individual served, was sufficient without specifying or showing the particular

property or debts supposed to be in the possession of or owing by him. That case always seemed to me to smack of judicial legislation; but it lays down a wholesome rule, the operations of which are particularly beneficial.

No one will contend, however, that any kind of property can be affected by an execution until a levy is made upon it. The code in effect declares this. (Code, sec., 283, subd. 5.) And the only legal evidence of a levy having been made is a sheriff's return, which must directly certify the fact. But if the return from the sheriff were sufficient to show that he levied the execution upon the debt in question, still I do not see that it would aid the appellants in this case, as they do not allege in their answer, which is in the nature of a cross-complaint, that such levy was made. Parties do not recover in such cases according to their proofs, but according to their allegations *and* proofs.

The next question for consideration is in regard to the certificates furnished by the said William M. Davis to the said sheriff, in pursuance of the notice delivered with the copy of the writ of execution, and the purport thereof. In order to authorize the sheriff to sell the property of the garnishee or the debt levied upon, it must appear from the certificate of the garnishee that he was owing a debt to the judgment debtor. If the debt is due, and he does not pay it on demand of the sheriff, the latter may levy upon and sell any of his property subject to sale on execution. But if such debt is not due, the sheriff shall sell the same according to the certificate as other property. In either case, the confession of the garnishee that he is owing the judgment debtor gives the sheriff the authority to proceed under the execution as mentioned. The effect of the confession is similar to that of a confession of judgment. It must be a clear and unqualified statement concerning the indebtedness of the garnishee

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to the judgment debtor, and show that it is not due; otherwise the sheriff has no power to sell it.

It appears that Davis furnished the sheriff two certificates, one at the time the copy of the writ and notice were delivered to him, and the other about a month later, but a number of days before the sheriff took any steps to make the sale.

In the first certificate, the said William M. Davis stated that he was indebted to the said Mary Davis on the three promissory notes mentioned, less \$350 paid on the one due on the first day of December, 1885. The second certificate was amendatory of the first one. In the second, said Davis stated that his former one was erroneous; that he was not and had not been indebted to Mary Davis in any sum since some time in January, 1886; that at the time he made said certificate, he in good faith thought that he was indebted to her, and made his said certificate when he so believed; that, as he was now advised, the notes and mortgage which he formerly made to Mary Davis were, some time in January, 1886, assigned by her to John W. Batchellor; that said assignment was in said month of January recorded in the office of the county clerk in Marion County; that at the time he made said certificate he did not know of said assignment, and that by an agreement between him and Mary Davis, made while she owned said notes and mortgage, it was agreed by her that he was not to be pressed or called upon to pay any of said notes until the following fall or winter; that he did not know whether or not said assignment was made in good faith.

If the two certificates of the garnishee are to be considered as the certificate given by him, then it is evident that the sheriff had no authority to proceed and sell the debt upon the execution. The plaintiff in the writ has no right to question such a certificate, however inconsis-

tent it may be. He must either accept it as made, or pursue the remedy pointed out in section 312 of the code. That section provides that if the certificate be unsatisfactory to the plaintiff, the garnishee may be required by the court, or judge thereof, where the action is pending, to appear before him and be examined on oath concerning the same; and after the allowance of such order, and before such garnishee shall be thereby required to appear, or within a time to be specified in the order, the plaintiff may serve upon him written allegations and interrogatories touching any of the property liable to execution as the property of the defendant; and if the garnishee fail to answer, the court, or judge thereof, on motion of the plaintiff, may compel him to do so, or the plaintiff may have judgment against the garnishee for want of such answer. The plaintiff may also reply to the answer and have the issues arising thereon tried as ordinary issues of fact are tried. The garnishee clearly has the right in the first instance to furnish the sheriff such certificate regarding any debt owing by him to the defendant as his conscience may approve, and I do not see why he would not have the right to correct any supposed mistake therein by furnishing a second certificate, if he did so before any subsequent proceedings were had in the matter. (Drake on Attachments, 4th ed., sec. 650.)

In this case, the sheriff received the second certificate and made it a part of his return of the execution, and in my opinion the plaintiff in the writ had no right to ignore it, and attempt a sale of the debt. He could have procured an order requiring the garnishee to appear before the court, or judge thereof, and have served upon him written allegations and interrogatories; could have had an issue made up, and had the question of the fraudulent assignment of the said notes alleged to have been made by the said Mary Davis to the respondent tried by a jury,

Opinion of the Court on Rehearing — Thayer, C. J.

and I am constrained to believe that he should have pursued that course.

Under the views above expressed, it is not necessary to consider any other alleged irregularities regarding the proceedings of garnishment, as the decree appealed from must be affirmed upon the grounds already examined; nor is it necessary to determine whether or not the assignment of the notes to the respondent was made with a fraudulent intent, and the appellants should not be prejudiced by the decree herein from attacking that assignment in a proper case.

PETITION FOR REHEARING.

[Filed April 16, 1889.]

THAYER, C. J.—“Garnishment rests wholly upon judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution. It is in the nature of a proceeding *in rem*, since its aim is to invest the plaintiff with the right and power to appropriate to the satisfaction of his claim against the defendant property of the defendant's in the garnishee's hands, or a debt due from the garnishee to the defendant.” (Drake on Attachments, 4th ed., secs. 451, 452.)

The nature of the proceeding is such that a party claiming to have acquired property rights by means of it must, in order to maintain them, show a strict compliance with all its requirements. Hence, before the appellants in this case could be regarded as the owners of the notes and mortgage in the suit, it was necessary for them to show the due issuance of an execution upon the judgment in favor of E. W. McCann against Mary Davis; its levy upon the debt due to her from William M. Davis; that the latter gave to the officer who had the execution for service a certificate showing that he was owing the debt to Mary Davis; that the debt was not then due, and

that the officer proceeded to sell the same according to the certificate as other property.

These various steps were necessary in order to divest ownership of the notes and mortgage out of Mary Davis, and the appellants were required to show that they had been taken, in order to establish title to them. The return of the sheriff to the writ of execution is inaccurate, though the statement contained therein may be sufficient to show that he levied upon the debt. It would have been more exact, however, if he had stated in the return that he levied upon the debt, and the manner in which the levy was made, instead of stating that he levied and served the execution on William M. Davis, and the manner in which he levied and "served" the same on said Davis. But the question as to whether the certificates given by William M. Davis to the sheriff showed that the former was owing the debt to Mary Davis, and authorized the sheriff to sell it as her property, cannot, in my opinion, be resolved in favor of the appellants, and this is decisive of the case against them.

The petition for a rehearing must therefore be denied.

[Filed February 19, 1889.]

**THOMAS FINLAYSON, RESPONDENT, v. MARGARET
FINLAYSON, APPELLANT.**

DEED — CONSIDERATION RECITED IN — PAROL EVIDENCE TO VARY — EFFECT OF. — A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration had been received by the grantor; nor can it be shown by such evidence that the object or purpose of a deed duly delivered to the grantee was different from that implied by its terms, unless executed to secure the payment of a debt or the performance of some other act.

ID. — MAY BE SET ASIDE FOR FRAUD OR DURESS, WHEN — RESULTING TRUST. — A deed may be set aside for fraud or duress, and a trust may

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arise out of a transaction which will be enforced in face of the express terms of a deed, but it must be a trust arising by operation of law. The parties to a deed cannot create a trust in favor of the grantor except by an instrument in writing declaring the same.

FRAUD — EQUALITY OF FOOTING OF PARTIES. — Fraud will vitiate a contract; but where the parties to the contract stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of a reasonable caution and vigilance, to detect its falsity.

HUSBAND AND WIFE — IMPROVEMENT OF WIFE'S PROPERTY BY HUSBAND. —

Where a wife urged and importuned her husband to convey to her, in her own right, valuable premises which the husband had acquired by the joint efforts of both since their marriage, and the husband was induced to make the conveyance through such urging and importunity and the assurances of the wife that he should enjoy them with her as a home the same as he had previously; and after the conveyance was made she induced him by similar assurances to build a new house upon the premises and otherwise improve them, at an expense to the husband of four thousand dollars, and after living upon the premises as they usually had done for three years and a half, difficulty arose between them, resulting in her expelling him therefrom: *held*, that her persuasion, importunities, and assurances, and her subsequent conduct in expelling him from the premises, did not constitute a fraud that would justify a court of equity in setting aside the deed of conveyance; but *held further*, that the amount of the expenses incurred by the husband in building the house and in improving the property should be paid to him by the wife, and should be made a charge upon the premises in his favor.

APPEAL from the Circuit Court for the county of Baker.

R. S. Anderson, I. D. Haynes, Thornton Williams, and M. L. Olmsted, for Respondent.

A. J. Lawrence and C. W. Manville, for Appellant.

THAYER, C. J. — This appeal is from a decree rendered in a suit brought by the respondent against the appellant to set aside a deed to real property executed by the former to the latter on the fifteenth day of February, 1881, or, as alternate relief, that a claim in favor of the latter for service and expenses be charged upon the said real property.

The parties are husband and wife, and it is claimed by

respondent that the appellant, through fraud and deceit, induced him to execute the said deed to her. The facts constituting the fraud, as alleged in the complaint, are in substance as follows: That appellant did not care for or love respondent as her husband for many years prior to the execution of the deed, and conspired with their daughter to obtain said real property in her own right and to expel the respondent therefrom, and to exclude him from all enjoyment thereof; that, in order to accomplish that object, the appellant fraudulently represented to the respondent that she loved him, that in case of his death she ought to have his lands, and that a deed conveying them to her, executed during his lifetime, would in no wise affect his equal enjoyment of them with her, and that such lands should be their home in their old age, and that if he should suddenly die it would be better for her to take and have the lands already in her own right; that the love and affection he bore her and the children were fully reciprocated, and that if he would, for the sake of that love and affection, convey the lands to her, and thereafter build upon and improve the same, he would thereby provide a home for her, and to which he would ever be welcome and be treated with the same love and affection which she was pretending to entertain for him; that if he would make such deed, erect a house on the lands, and improve the same, he should possess and enjoy it the balance of his life; that respondent believed such representations, and, relying upon the same, executed the deed, and thereafter built a house thereon and made other improvements, of the value of four thousand dollars; that he expended about three thousand dollars in making the improvements, besides his personal work and labor in accomplishing the same, and which increased the value of the premises more than five thousand dollars; that as soon as said labor, improvements,

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etc., were completed, about October 1, 1884, appellant turned respondent out of doors, took the grain in the granaries, which he had sown and garnered, and drove him away, saying: "I have got now what I have been working for for twenty years," and asserted her claim to the premises, and demanded that he should vacate them, or that she would charge him rent if he staid thereon; that thereafter appellant commenced a suit for a divorce, charging respondent with cruel and inhuman treatment, which suit was still pending, and to which he had a good defense upon the merits; that by reason of the premises respondent was homeless, reduced in circumstances almost to destitution, at an age too late in life to toil; that no consideration passed from appellant to respondent for said deed, nor had appellant accounted with respondent for the expenses, toil, labor, and services performed by him, and that she refused to account for the same; and he prayed for a cancellation of the deed, or, in case that could not be granted, for an allowance of a just claim for said services and expenses, and that the same be declared a lien on the said land.

The appellant filed an answer in the suit, denying the allegations of the complaint, and the case was heard upon depositions and proofs, and the circuit court decreed to the respondent one half of the land deeded.

Neither party has printed the evidence and proofs in the briefs furnished, as required by the rules of this court, and we have no means of ascertaining the facts of the case without reading the depositions, which have been sent here with the transcript, unless we adopt the findings of the circuit court. The findings are full, and as neither party claims but that they were warranted by the evidence, we feel justified in relying upon them.

The circuit court found that the parties were married in Scotland in the year 1846, and had lived together as

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husband and wife ever since that time until about October 1, 1884; that the respondent was of the age of sixty-two years, and the appellant sixty-three years; that the issue of the marriage was eight children, four of whom were living; that they were all females, and all married except the youngest, who was twenty-seven years old, and resided with the appellant; that the parties settled upon the land in question in the fall of 1864, and by their joint labor and earnings, the respondent acquired title thereto; that they had fenced and cultivated a portion of the land, and had built a house on it; that respondent was an ignorant and uneducated man,—was not able to read or write; that during their residence in Oregon the respondent had, up to about October, 1884, trusted the appellant with keeping the accounts and moneys received by him from the sales of stock, the proceeds of the produce of the farm, and the payment of all bills created in managing their business of farming, and raising cattle and horses; that the respondent was the owner of 280 acres of land of the aggregate value of about \$2,500, about 70 head of horses of the value of \$2,100, 10 cows of the value of \$200, and 27 sheep of the value of \$60, but was indebted in the sum of \$2,000; that on or about March 1, 1881, the respondent fell from his horse, and was injured, which confined him to his bed from four to six weeks; this, with other sickness, and the risk he was constantly taking in his business, so alarmed him as to create a presentiment that he would meet with a sudden death by accident. If this were to happen, he thought the appellant would lose her home, and that it was necessary, in order to prevent such a result, to deed her the land in controversy; that it consisted of 244 acres, and was of the value of \$12,000, and that, in order to accomplish the purpose mentioned, the respondent did, on the fifteenth day of February, 1881, execute and deliver to the appellant a

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deed to the same; that there was no money paid for the land, and that the only consideration therefor was love, affection, confidence, and trust which the respondent entertained for the appellant; that the parties by their joint and individual efforts acquired all the property mentioned, which, in October, 1884, amounted in value to \$17,500; that prior to the execution of said deed, and from about the year 1876, the appellant had importuned the respondent to make her a deed to some of his property, which, she said, "was the custom of other husbands to do"; that respondent had proposed to deed to her the said 280 acres of land, but the appellant would not accept it, desiring him to convey to her the premises in question, which the former finally consented to do; that shortly after the execution of said deed, the appellant began to persuade the respondent to build upon the land deeded to her, which the respondent reluctantly did, erecting thereon a dwelling-house, at a cost, including work, labor, and material furnished, of \$1,600, all of which was paid for by him except about \$200; that the respondent, after the execution of the said deed, continued to occupy said premises, cultivate the same, and keep his stock thereon as he had previously done, until October 1, 1884; that during said time he reset, repaired, and built a fence around two thirds of the land, cleared brush and timber from portions of it, leveled the surface thereof, and did work to the value of \$8,000, no part of which had been paid or tendered him; that on said last-mentioned date the appellant determined that she would no longer live with the respondent as a wife, and that he should not remain upon the premises, and instituted aggressive measures to drive him off.

I conclude from these and other findings made by said circuit court that the parties married and lived together about the same as married people usually do; that they

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were industrious and frugal, and thereby accumulated a reasonable competency; that the appellant conceived the idea that she should have the title to the property in question in her own name, and by her urgent solicitations induced the respondent to execute the deed in question. It does not appear that she entertained a design while she was importuning the respondent to make the deed of procuring it for the purpose of dispossessing him or of expelling him from the premises. She undoubtedly thought that a conveyance of the land to her would exhibit a mark of confidence, and enable her to assume more individuality. Neither party anticipated that the execution of the deed would effect a change of the occupancy or management of the property conveyed. They both doubtless expected that the same course which they had theretofore pursued with reference to the property would be continued, and that their relations generally would be unaffected. The circuit court, actuated by a generous spirit of equity, divided the property between the parties. This seems to have been a just disposition of the affair in view of the circumstances of the particular case, and we would gladly sustain it if we could do so in accordance with legal principles. But equity, like the common law, must be controlled by general rules, which are as unalterable in the one case as in the other. The intention of the respondent in executing the deed to the appellant must be ascertained from the terms of the instrument and the circumstances surrounding the transaction.

When one party duly executes his deed to real property to another; he is precluded from showing by parol testimony that the object and purposes of the instrument were different from that implied by its terms, except in the case of deeds executed as a security for the payment of debts. "The grantor in an absolute conveyance of land, not alleging fraud or mistake, cannot prove by parol that

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the grant was in trust for himself." (*Sturtevant v. Sturtevant*, 20 N. Y. 39.)

Nor can a deed be invalidated by parol evidence that there was no consideration for its execution, where there is one acknowledgment in it.

"In every case where a consideration is required, it is not necessary that the consideration be actually passed to the grantor, if the receipt of a proper consideration is acknowledged by him in the deed. But it must be acknowledged in the deed, or it must be proved *aliunde*, to have actually passed to the grantor. But while parol evidence is inadmissible to contradict the acknowledgment of consideration in order to invalidate the deed between the grantor and grantee, yet the acknowledgment is only *prima facie* evidence of the character and amount of the consideration. The amount and kind of consideration acknowledged is presumed to be the consideration agreed upon; but it may be shown by parol evidence, in an action to recover the consideration, that a different kind or amount of consideration had been agreed upon." (5 Am. & Eng. Encyc. of Law, 436, 437.)

Transactions of great importance would have no stability if the parties thereto were permitted to show by parol proof that written instruments solemnly executed by them did not mean what the language of the instrument purported. An absolute deed to real property conveys from the grantor to the grantee all the title of the former, and he will not be allowed to prove by parol evidence that it was made in trust for him, or that there was a reservation in his favor of any right not expressed therein, nor that the deed is invalid for the want of consideration, where he acknowledges therein the receipt of one.

A deed may be reformed in case of a mistake made in reducing its terms to writing, or it may be set aside for fraud or duress; and a trust will often arise out of a trans-

action which will be enforced in face of the express terms of a deed; such a trust, however, belongs to that class which are denominated implied trusts, and which arise by operation of law.

No implied trust can arise from the facts in this case; nor could any trust have been created in favor of the respondent in the premises conveyed except by an instrument in writing declaring the same.

The deed in question can only be avoided by proof that the appellant procured it to be made through fraud, and it is apparent that the findings of the court are not sufficient to warrant the conclusion that such was the fact. The fact that the appellant solicited and importuned the respondent to execute the deed, and that the parties about three years and a half thereafter had difficulty, and the appellant asserted her legal rights as owner of the premises, and attempted to expel the respondent therefrom, do not establish a fraudulent intent on her part to deprive him of his property. She had a right to persuade him to make her a deed of a part of the property, which her labor and earnings had helped to accumulate, and after obtaining it, to manage, sell, convey, or devise the same by will, to the same extent and in the same manner that he could property belonging to him. Section 2992 of the Annotated Code of Oregon vests her with that right, and the provision was in force at the time of the execution of the deed. She was also empowered, in case the respondent had possession or control of the property, to maintain an action growing out of the same, in the same manner and extent as if they were unmarried. (Ann. Code, sec. 2876.)

I cannot discover from the findings that any such deception was practiced upon the respondent in procuring the execution of the deed as would justify the court in setting it aside. The appellant undoubtedly, in urging

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him to convey the land to her, held out the inducement that they would continue to occupy it as they formerly had done, and she probably believed at the time that such would be the case; but trouble seems to have arisen between them, occasioning serious discord in their affairs. This may have been the fault of the appellant; but if so, it would constitute no ground for avoiding the deed.

The respondent should have protected himself by a condition in that instrument against the consequences of such an occurrence.

Courts cannot relieve parties from imprudent bargains; they must suffer the consequences of their indiscretion, unless an undue advantage has been taken of them. Fraud will vitiate a contract; but where the parties to it stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of reasonable caution and vigilance, to detect its falsity. But upon the other ground of relief claimed in the complaint in the suit, I think the respondent should prevail. The circuit court found that he was induced and led to believe, and did believe, that in doing the work and labor in building the new house, making the fencing and other improvements upon the premises, he was making for himself and appellant a more comfortable home, which they would enjoy the benefits of and of the profits of the land during the remainder of their lives, and that the fact of his making the deed would not prevent his enjoyment of the land and the improvements thereon, or in any manner disturb the relation between himself and the appellant, and that they would hold the property jointly.

Under such circumstances, the respondent should, when he has been expelled from the premises by the act of the appellant, be paid for the labor and the expense incurred by him. It would be inequitable to allow the appellant

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to retain the fruits of the respondent's labor and expense, after having induced him to bestow them under the assurances mentioned, which she had failed to observe. She had the right under the statute to take the management of the premises, but to urge him to make the improvements with the understanding that he was to enjoy it, and then deny him the right, without paying him therefor, is bad faith and fraudulent.

This court held in *Frasey v. Wheeler*, 4 Or. 190, that a court of equity would not encourage a married woman to perpetrate a fraud; and that where she had received money upon a contract for the sale of her land, and the purchaser was induced to put valuable improvements upon it, the amount of the money and value of the permanent improvements should be charged upon the lands. In that case the woman was dealing with an outside party; but I think a husband has rights in such matters which a wife is bound to respect.

The facts in this case show that the respondent bestowed labor and expense upon the land in question, after the execution of the deed to the appellant, to the amount at least of four thousand dollars, and that he was induced to do so upon the assurance that he should occupy and enjoy the property; that in October, 1884, the appellant notified him that he should not remain on the premises any longer, and that since that time he has had no use of them. In view of these facts, I am of the opinion that the respondent is entitled to be paid said sum of four thousand dollars, with interest thereon at the rate of eight per cent per annum from the first day of November, 1884; and that the amount should be made a charge and lien upon the premises conveyed by the respondent to the appellant; and that in default of the payment of the same, with accrued interest, within ninety days after the entry of the decree herein, that the

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respondent have execution for the sale of said premises for the satisfaction of such amount and accruing interest, as in case of execution on foreclosure of lien on real property, and that the respondent recover costs and disbursements in the suits in both courts.

LORD, J., took no part in deciding this case, as he was absent when it was heard.

[Filed February 25, 1889.]

THE STATE OF OREGON, RESPONDENT, v. FRANK P. LIGHT, APPELLANT.

GAMBLING — INDICTMENT — NAMES OF PARTICIPANTS. — In an indictment for betting at a game played with cards called "stud-poker," it is not necessary to allege the names of other persons who bet at the game at the same time, or to allege that they are to the grand jury unknown.

INDICTMENT — STATUTORY OFFENSE. — In an indictment for a statutory offense, it is generally sufficient to follow the descriptive words of the statute defining the crime.

DEALER — ACCOMPLICE. — The dealer of a game of stud-poker is an accomplice with those who bet money or value at such game. Both are necessary to complete the offense, — each performing a separate and necessary part in the violation of the statute. The fact that each is punishable for the part he performs can make no difference as long as the concurrent acts of both are necessary to complete the violation of the statute.

APPEAL from Lake County.

W. M. Colvig, for Respondent.

M. A. Kelton and Cogswell & Cogswell, for Appellant.

STRAHAN, J. — The defendant was indicted for the crime of "willfully and unlawfully playing at a certain game called 'stud-poker,' a game played with cards, for money, and checks as representatives of money and value." The defendant demurred to the indictment for

17	358
18	358
20	524
23	291
31*	132
23*	252
26*	837
29*	1029
17	358
28	396

several reasons, which demurrer was overruled by the court, and upon a trial before a jury he was convicted, from which judgment this appeal is taken.

1. The first objection which will be noticed is one presented by the demurrer to the indictment. It is insisted that the indictment is bad, for the reason that the names of the persons participating in the game at the time the defendant played are not set out in the indictment, nor is it alleged that they were unknown to the grand jury. The authorities cited by counsel for appellant certainly support his contention, if they are to be followed. (*Jester v. State*, 14 Ark. 552; *Barkman v. State*, 13 Ark. 703; *Groner v. State*, 6 Fla. 39; *Butler v. State*, 5 Blackf. 280.) But the later authorities are the other way. (*Goodman v. State*, 41 Ark. 228; *Hinton v. State*, 68 Ga. 322; *Roberts v. State*, 32 Ohio St. 171; *State v. Pancake*, 74 Ind. 15.) I think the better reason is with the later authorities. In an indictment for a statutory offense, it is generally sufficient to follow the descriptive words of the statute, which was done in this case. The particular facts and circumstances, who participated, etc., are matters of evidence, and need not be pleaded.

2. It appears from the bill of exceptions that one McDonaugh, who was the dealer at the time the defendant is charged to have played, was the only witness introduced or examined on the part of the state. At the conclusion of his evidence, the court charged the jury as follows: "There being no other evidence than that of witness McDonaugh, if you find that he was an accomplice, you must acquit. To constitute him an accomplice, he must have received a share of the profits, or a compensation out of the game. If he was simply dealing the game to enable others to play, but was not betting in the game, nor receiving anything therefor, he was not an accomplice." To the giving of this instruction the de-

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fendant excepted. On the same subject the defendant asked the court to instruct the jury as follows: "If you find from the evidence that witness McDonaugh aided or abetted the playing of the game for which the defendant was indicted, he was an accomplice; and if you find that he was an accomplice, you must acquit the defendant, as his evidence is uncorroborated." This instruction was refused, to which an exception was also taken. The witness McDonaugh was indictable, and liable to the same punishment for dealing the game, which was played for money, checks, credits, or any other representative of value. (Hill's Code, sec. 3526.)

The question presented for our consideration therefore is, Did McDonaugh become an accomplice by dealing stud-poker, at which the defendant bet money, or representatives of value?

In *State v. Roberts*, 15 Or. 187, this court quoted with approbation Wharton on Criminal Evidence, section 440, defining an accomplice as follows: "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime."

Substantially the question presented by the instruction given and the one refused was before the court for determination in *Davidson v. State*, 33 Ala. 350, and under a statute the same as ours, as to the corroboration of witnesses who were accomplices. In disposing of the question the court said: "An accomplice is defined to be 'an associate in crime; a partner or partaker in guilt.' (See Webster's Dictionary; Bouvier's Law Dictionary.) In Foster's Crown Law, 341, the word 'accomplice' is said to take in all *particeps criminis*. If, then, a person playing a game with cards adversely to the accused, and with him participates in the commission of the offense condemned by the statute, he is an accomplice."

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Further on, the court remarks: "Our argument does not involve the position that adversaries in fact are accomplices in law. Antagonists in playing cards are not adversaries as to the thing which constitutes the offense. They agree together as to the playing at a game with cards, and each voluntarily contributes to that end; and they are adversaries as to which one shall perform his part in the game with the highest skill. There is a perfect agreement among the players that each shall perform his part, and the strife between them is, which shall do it most skillfully."

No authority was cited at the hearing, and I have been unable to find any that sustains that part of the court's instruction defining an accomplice as applied to the facts of this case. Participation in guilt is what makes an accomplice. The dealing of a game with cards at which others bet money or values constituted McDonaugh's guilt, and it in no manner depended on whether he received a share of the profits or a compensation out of the game, or not. Nor was he guiltless "if he was simply dealing the game to enable others to play, but was not betting in the game nor receiving anything therefor." Dealing the game at which others bet made McDonaugh an accomplice with them in the violation of the statute, and his guilt did not depend upon his "profits" or "compensation." (*Commonwealth v. Burns*, 4 J. J. Marsh. 177; *Commonwealth v. Drew*, 5 Cush. 279.)

The statute punishes the dealing of a game at which others bet money or value. Dealing is not sufficient to constitute a crime; there must be betting. The act of at least two persons concurring together, one dealing and the other betting, are necessary to effect a violation of the statute, and I have no doubt there is such a connection between dealer and the party who bets as to constitute one the accomplice of the other. Both are necessary,

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and each performs his part of the acts which the law denounces as criminal, and the fact that each is punished for the part he performs can make no difference. The crime could not be committed without the concurrent acts of both.

Let the judgment be reversed, and the cause remanded for a new trial.

[Filed February 25, 1899.]

JOHN BIGNE, v. JOHN B. DAVID, ADMINISTRATOR OF
THE LEGATEES OF PIERRE MANCIET, DECEASED.

PRACTICE -- LONG AND COMPLICATED ACCOUNTS. — Where it becomes necessary to examine long and complicated accounts, an order of reference, in addition to directing the referee to take the evidence, ought also to direct him to find the facts and state the effect between the parties.

DECREE AFFIRMED. — Upon consideration of all the facts, *held*, that the decree of the court below ought to be affirmed.

APPEAL from Multnomah County.

W. W. Page, for Peter and F. P. Manciet and Gerdes & Botefuhr.

Strong & Strong and *James Gleason*, for Bigne.

M. G. Munly and *Watson, Hume, & Watson*, for J. B. David.

Dolph, Bellinger, Mallory, & Simon, for Linda Manciet.

STRAHAN, J.—This proceeding was instituted in the county court of Multnomah County by John Bigne against the personal representative and the legatees under the will of Pierre Manciet, deceased. A copy of Manciet's will is set out in *Palicio v. Bigne*, 15 Or. 142. Since the death of Manciet's widow, Petra Cortez, John Bigne has acted as

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sole executor of said will; but on the twenty-fourth day of May, 1887, the county court of said Multnomah County appointed John B. David administrator of the partnership of Manciet & Bigne, and the possession of all the partnership property of said firm passed into his hands.

On the twenty-sixth day of May, 1887, Bigne made, verified, and presented the following claim against the estate of Manciet:—

“Estate of Pierre Manciet, deceased.

“To John Bigne, Dr.

“To one half of entire amount, \$54,746.04, due from firm of Manciet & Bigne, composed of Pierre Manciet and John Bigne as equal partners, to John Bigne, \$27,373.02.

“In addition to the above, I also claim, as per annexed petition, to be the owner of the undivided one half ($\frac{1}{2}$) of all the property described in the inventory (except that certain furniture described as being in ‘Mrs. Manciet’s residence,’ and appraised at \$385.62), in this estate hereinbefore by me named and filed.

JOHN BIGNE.

“STATE OF OREGON, }
COUNTY OF MULTNOMAH. } ss.

“I, John Bigne, being duly sworn, say that I am the above-named claimant, and have personal knowledge of the facts in reference to my foregoing and annexed claim against the estate of Pierre Manciet, deceased; that the amount claimed therein is justly due; that no payments have been made thereon except as stated; and that there is no just counterclaim to the same to my knowledge. And affiant further says that his claim of an undivided one-half interest in said property is just and true, and that there is no offset to the same.

JOHN BIGNE.

“Subscribed and sworn to before me this twenty-sixth day of February, A. D. 1887.

“C. D. BOWLES, Notary Public for Oregon.”

With said claim was presented the following petition:—

“In the county court for the state of Oregon for Multnomah County.

“In the Matter of the
Estate of Pierre Manciet, deceased. } Claim of John Bigne.

“To the HONORABLE JOHN CATLIN, Judge of said Court.

“Your petitioner, John Bigne, would respectfully show to your honor that the said Pierre Manciet died on the twelfth day of April, 1881, and that your petitioner is now the duly appointed, qualified, and acting executor of the estate of Pierre Manciet, deceased, and has been such executor ever since the death of said Pierre Manciet; that on the sixth day of November, 1866, said Pierre Manciet and this petitioner, by mutual consent, at Portland, Oregon, entered into a general partnership in the business of a hotel and restaurant, and in acquiring and improving real property, in which partnership both parties were to contribute equally to the expenses, and were to share equally in the profits and losses thereof; the said partnership was not dissolved until it was so dissolved by the death of Pierre Manciet; that all the trade and business of said copartnership was carried on, and all of its property and assets were taken and held, in the name of said Pierre Manciet; that said partnership enterprise was a very profitable one; and said partnership acquired a large amount of assets and incurred liabilities; that the assets of said firm consisted of all the property described in the inventory herein as standing in the name of Pierre Manciet, except that mentioned as furniture in ‘Mrs. Manciet’s residence’; and all the liabilities of said firm have been proved up in the matter of the settlement of said estate, which is now going on. And your petitioner further shows that during said partnership your petitioner advanced large sums of money to said firm, and allowed said firm to use and retain in its business nearly all of his share of the

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profits thereof; that said Pierre Manciet put no money into said business, and from time to time drew out all of his profits therefrom; that at the death of said Pierre Manciet, said copartnership was owing to your petitioner the full sum of fifty-four thousand seven hundred and forty-six and four hundredths dollars (\$54,746.04), and was not owing said Pierre Manciet anything; that one half of said amount of \$54,746.04, to wit, \$27,373.02, was and is a just claim of your petitioner against the estate of said Pierre Manciet, deceased; that, as above stated in the foregoing claim and affidavit hereto annexed, there is no just counterclaim or offset to the same, and no payments have been made thereon; that by reason of being executor of said estate, your petitioner cannot examine or approve his said claim, but is compelled to and hereby does present the same to your honor for your examination and approval. And your petitioner further shows that all of the property embraced in and described in the inventory of the estate of said Pierre Manciet, hereinbefore filed, and to which reference is hereby had, except that portion of said property described as household furniture in Mrs. Manciet's residence, was purchased by said copartnership with its own moneys, and was and is partnership property, and your petitioner is the equitable owner of the undivided one half thereof; that all of said property was taken by said copartnership and held in the individual name of said Pierre Manciet, and was so held by it at the time of the death of said Pierre Manciet, and said Pierre Manciet, at the time of his death, held the legal title to said property for said copartnership, and not otherwise; that owing to the fact of the legal title to all of said property standing in the name of said Pierre Manciet, and all of the liabilities of said copartnership were contracted in the name of the said Pierre Manciet, all of said property was by your petitioner (saving, however, his rights as such partner) included in

the inventory of said estate of Pierre Manciet, deceased. Your petitioner admits and alleges that all of said property is first subject to the payment of all other just claims heretofore proved up in said estate; that all the claims against said estate, and all debts and liabilities of said co-partnership, except this claim of your petitioner, have been duly proved up against said estate, and said estate is more than ample to satisfy all of said claims. Wherefore your petitioner prays that the foregoing and annexed claims against said estate of Pierre Manciet, deceased, may be examined and allowed at said sum of \$27,373.02, and made payable out of the undivided one-half interest in said property equitably owned by said Pierre Manciet, deceased, after the payment and satisfaction of said other claims; that the claim be paid by said estate, or that your petitioner have leave to file a petition for the sale of the interest of said Pierre Manciet in so much of said property as may be necessary to satisfy said claim, and interest and costs and expenses; that a citation issue to all heirs and parties interested in said estate, to show cause upon a day certain to be fixed by your honor why the prayer of this petition should not be allowed, and for such other or different relief as may be right in the premises.

“STRONG & STRONG, Attorneys for Petitioner.”

This petition was properly verified on the eleventh day of March, 1887; Rachel Manciet, Vincent, Madaline, Louisa, and Pauline Manciet, by E. B. Watson, their *guardian ad litem*, appeared and objected to the allowance of said claim, or any portion thereof, and alleged that the hotel in Victoria known as the Hotel de France was also partnership property, and required the said John Bigne, who had sold said last-named property and received the proceeds of such sale, to account for the same as partnership property. Issues were duly joined, and the matter referred to take the evidence.

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After the evidence had been taken, the parties made and filed in said matter the following stipulation:—

“In the county court of the state of Oregon for Multnomah County.

“In the matter of the claims of John Bigne against the estate of Pierre Manciet, deceased, etc.

“Stipulation for submission of all claims of or against said John Bigne individually or as executor, etc.

“Whereas, John Bigne, executor of the estate of Pierre Manciet, deceased, and until the appointment of John B. David, herein professing to act as the executor also of the partnership estate of Manciet and Bigne, has heretofore prior to the appointment of said John B. David presented to this court for its approval his claim against the estate of Pierre Manciet, deceased, for an undivided one-half interest in all the property described in the inventory of said Manciet estate, and also for a large sum of money claimed by him to be due to him by said Pierre Manciet, deceased, upon a partnership accounting between them.

“And whereas, divers controversies have arisen in regard to said claim, and by order of this court the same has been referred to a referee, and evidence has been taken thereon, which evidence has been reported back to this court.

“And whereas, said John Bigne claims, in addition to said former claims, to have made large advances under the will of said Pierre Manciet, and as executor and as acting executor since the death of said Manciet, which amount to the date thereof is set out in his account purporting to be his final account herein, filed on the ninth day of September, A. D. 1885.

“And whereas, he claims to have made other advances since said filing of said final account; and whereas, it is to the best interests of all parties that all controversies in

regard to said claims should be finally determined; and whereas, in the present involved condition of said estates it is difficult to determine in what manner to settle said claims and accounts between said John Bigne, individually and as executor or administrator, and said estate or estates, except in this proceeding; and whereas all parties in interest have consented thereto.

“It is hereby stipulated that John B. David, administrator of the partnership estate of Bigne and Manciet, may be joined as a party hereto; that this court in this proceeding shall, upon the evidence submitted to it, and upon such further evidence as may be taken hereunder, and without other or different pleadings, ascertain, determine, and declare,—1. What interest as a partner or otherwise said John Bigne now has in all or any of the property described in the inventory of the estate of Pierre Manciet, deceased; 2. The amount due said John Bigne upon a partnership accounting between himself and Pierre Manciet, deceased, at the date of the death of Pierre Manciet, with such interest as the court may allow to the date of its decision; 3. The amount due said John Bigne from the said property of said estate or partnership, or the partnership administrator, for advances by said Bigne under the will of the said Pierre Manciet, deceased, or upon any of said accounts as shown by said final account or otherwise, since the death of said Pierre Manciet; 4. The amount, if any, that said John Bigne as executor or otherwise should account for to said partnership or other estate for rent, or any other reason; to the end that a complete settlement may be made of all said claims and controversies. Nevertheless, the findings and decree of said court may be appealed from in the usual way, as from a suit or cause regularly pending and determined.

“It is further understood and agreed that said John Bigne and said contestants and other parties hereto may

within, from this date, introduce additional evidence for or against advances made by said John Bigne since said final settlement.

"And that this court, upon final hearing, shall make such orders and decrees, appealable from as aforesaid, as may effectuate and enforce this agreement, and do right and justice in the premises in accordance with its findings hereunder.

"And this court and all appellate courts may, at any time, allow any of the parties hereto to file such further papers, pleadings, or petitions, supplemental or otherwise, if any, as this court or any appellate court may deem necessary or advisable.

"STRONG & STRONG,

"JAMES GLEASON,

"Attorneys for John Bigne.

"WATSON, HUME, & WATSON,

"M. G. MUNLEY,

"Attorneys for Contestants.

"JOHN B. DAVID,

"Administrator of Partnership."

Upon the filing of this stipulation, the cause was again referred, and a large number of depositions taken by the respective parties; and the books of account of the partnership, extending probably over the entire time of said partnership, were also introduced in evidence. The referee made no findings of either fact or law, for the reason the order of reference did not empower him to do so; but it seems to us that such findings were necessary to enable this court to review the questions of fact in a satisfactory manner upon which the decision of this case must depend. Such finding would have narrowed the controversy, and brought the parties to a direct issue upon comparatively few questions of fact, and it might have then been possible to have examined the evidence in relation to them.

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The county judge seems to have given the facts a careful examination, and reached certain conclusions of fact which are stated in his findings, and entered a decree in accordance therewith, from which both sides appealed to the circuit court, where a *pro forma* decree was given affirming the decree of the county court, from which last-named decree both sides also appealed to this court.

The findings of the county court are as follows: "That said Peter Manciet died on the twelfth day of April, A. D. 1881, in Multnomah County, Oregon. He and said John Bigne had, as equal copartners, been engaged in the restaurant and hotel business in the city of Portland, in said county and state, continuously from about the eighteenth day of September, A. D. 1866, to the date of Manciet's death, at which last date they were engaged in keeping the St. George Hotel in said city; that, prior to the date of the copartnership between them as aforesaid, they had been copartners in the hotel and restaurant business at Victoria on Vancouver Island, from about July, A. D. 1858, to about September 18, 1866, but said copartnership had been settled up and dissolved prior to the existence of the copartnership established at Portland aforesaid. And all the interest of the partnership at Victoria, in both real and personal property, had been sold and conveyed to John Bigne, and Manciet owned there only the property mentioned in the inventory; that lots numbered 1 and 2 in block numbered 128, in the city of Portland, were purchased by the firm for its use, and paid for with money belonging to the firm, and thereafter the said St. George Hotel was erected upon said lots by said copartnership for its use, and paid for and furnished as a hotel with the money and credit of said firm, and by it occupied and used as a hotel, and was so used at the time of Manciet's death; that blocks numbered 92 and 93 in the city of East Portland, in said county,

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and a certain tract of land containing five acres, situate in said county, were each and all of them purchased with money belonging to said firm, and after the several purchases, the taxes, repairs, and expenses of caring for said lots and parcels of land was paid by the firm out of its money, and the rents and income therefrom were received by the firm and went into its business; that the title to each and all of said parcels of land, including said lots Nos. 1 and 2, stood in the name of said Peter Manciet at the time of his death; that he held the same in trust for the said copartnership; that a certain tract of land described in the inventory filed in said estate, as containing ten acres, was purchased by the said Peter Manciet with money by him drawn from the business and funds of said copartnership, and by him charged to himself on the books of the firm. The household furniture and other property in the residence of Peter Manciet, deceased, was purchased by him for his own use.

"2. John Bigne put into the partnership business, over and above amounts put in by Peter Manciet, prior to his death, as follows:—

March 11, 1872.....	\$300 00
July 26, 1880, to pay Ladd & Tilton.....	600 00
Oct. 19, 1880, to pay Ladd & Tilton and Walter Bros.....	1,000 00
Dec. 6, 1880, to pay Cooper.....	150 00
Feb. 23, 1881, to pay Ladd & Tilton.....	2,000 00
Interest collected from Trimble and Zicken notes	3,745 00
Rents collected from Bigne's house.....	1,319 25
Total.....	\$9,114 25

"John Bigne, prior to Manciet's death, drew from the partnership funds, as shown by claimant's exhibit No. 5, filed herein as a part of testimony.....\$7,548 65

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“And other sums as follows:—

May 11, 1871, money paid M. La Bonne.....	\$2,000 00
Money paid Castlebaum.....	3,500 00
Money loaned Zeiber, July 8, 1874.....	3,000 00
Money loaned Trimble, April 2, 1875.....	3,000 00
Money put into Prag speculation, Nov. 1875...	1,900 00

Total.....	\$20,948 65
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Debits in excess of credits.....	11,834 40
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“Manciet, prior to his death, drew from the partnership business in the aggregate \$34,808.43, as follows:—

Pierre Manciet's debits account as shown by claimant's exhibit No. 3.....	\$37,642 51
Amount paid for the ten-acre tract of land, as shown by the books and charged to Manciet	2,362 50

Total.....	\$40,005 01
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Total items deducted as per the following state- ment.....	2,396 58
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Leaves Manciet's debit account.....	\$37,608 43
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Items deducted from Manciet's debit account (see claimant's exhibit No. 3).

“These items, it may be said, are numerous, and amount in the aggregate to \$2,396.58.

Bigne's debits in excess of credits.....	\$11,834 40
Manciet's debits in excess of credits.....	37,608 43
Showing balance in favor of Bigne at Man- ciet's death of.....	\$25,774 03

“That Bigne, from October 10, 1866, to December, 1868, and from June, 1869, to December, 1870, and from August, 1875, to January, 1876, did not give his time and attention to the business of the copartnership; that Manciet kept the books of account during the existence of the copartnership most of the time, and was the busi-

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ness manager of the details of its affairs; that Bigne was cook, and looked after and superintended the cooking department of the restaurant and hotels kept by the firm; that Bigne had access to the books of account, occasionally examined them, sometimes made entries in them; that each partner had the utmost confidence in the honesty and integrity of the other, and to such an extent that they were careless as to how they stood upon their books, and often entries were not made which should have been made.

"3. At the time of Manciet's death, as appears by the books of the firm, there was cash on hand which should be charged to Bigne....		\$1,623 14
Since Manciet's death Bigne has received and collected rents from partnership property amounting to.....		4,142 00
Upon a note of \$1,510.75, dated January 19, 1879, and made to said firm, upon which a payment of \$900 had been made before Manciet's death, to wit, March 25, 1881, Bigne admits receiving the sum of.....		650 00
Inasmuch as Bigne makes no explanation concerning the terms of said note, he should be charged interest on said sum of \$650 at the rate of eight per cent per annum for four years two months and twenty-two days, making..		219 80
Being from date of payment of the said \$900. It appears by the firm's books that, at the time Manciet died, there was due the firm in the neighborhood of \$1,000. As Bigne makes no accounts of these book-accounts, he should be charged with the amount that was collected, say.....		500 00
Total.....		\$7,134 94

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Bigne should be charged with rent of the St. George Hotel and furniture, for seventy months, at the rate of \$300 per month (that being deemed reasonable) making.....\$21,000 00

Total.....\$28,134 94

“Bigne should be credited with money expended since Manciet’s death,—

For repairs to real estate..... \$2,238 07

For payment of interest made..... 6,066 75

For taxes paid to the amount of..... 654 90

(Items of \$322.76, \$35.00, \$16.25, and \$71.59 disallowed.)

For insurance..... 827 00

For miscellaneous payments..... 465 00

Total.....\$10,251 72

Charges in excess of credits..... 17,883 22

“STATEMENTS OF ACCOUNTS BETWEEN BIGNE AND THE ESTATE OF MANCIET.

“Receipts by Bigne, as executor,—

From sale of lot in Victoria..... \$950 00

From life policy on Manciet’s life..... 2,010 00

Total.....\$2,960 00

“As such executor he should receive credits as follows:—

Payment of debts of Manciet..... \$3,156 52

Payment for support of Manciet’s widow and minor children..... 3,748 00

Advances to devisees (children) to August, 1885, besides above not disputed, and therefore allowed..... 3,365 84

.Disallowed \$3,148.71, as the same appeared to be advances made by executor without authority to devisees, children of deceased.

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Commissions as executor.....	\$934 91
Contestants admit the executor should be credited with supplies, support, etc., furnished the minor children of the deceased, and not in above items.....	1,384 84
Deduct receipts from disbursements, and it leaves the estate of Manciet indebted to Bigne, as executor, in the sum of.....	9,530 87

"CONCLUSIONS.

"The decree should be, that Bigne recover from the partnership estate the sum of \$7,890.81, and after the payment of said sum, that the partnership estate be equally divided between the said John Bigne and the estate of P. Manciet; that Bigne recover from the estate of P. Manciet the sum of \$9,530.87; that the decree be based in other respects upon the foregoing findings of fact.

"JOHN CATLIN, Judge."

1. Counsel opposing Bigne's claims contend that the hotel property at Victoria, which it appears Bigne sold and received the proceeds of, ought to be brought into the account, and Bigne be made to account therefor. Bigne says that when Manciet left Victoria to engage in business in Portland, the partnership existing at the former place was dissolved, and that he assumed the debts and liabilities of the concern, and purchased the interest of his copartners. The evidence is not satisfactory in relation to these Victoria transactions. There is much force in the claim of counsel that said partnership continued. On the other hand, Bigne's counsel contend that the ten acres of land mentioned in the findings, and which the court below found was Manciet's individual property, was in fact purchased with the money of the partnership, and therefore is partnership property. This claim seems to me to be equally as well founded as the other. Both may be

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correct, but viewing this case in all of its complications, we have concluded not to disturb the findings on these points either way,—one substantially offsets the other.

2. The court below charged Bigne with rent for the use of the St. George Hotel for seventy months, at the rate of three hundred dollars, making twenty-one thousand dollars. To this Bigne's counsel object. It appears that Bigne and Mrs. Manciet qualified as the executors of Manciet's will, and that Mrs. Manciet lived a little over one year thereafter; that during said year Bigne wished to leave the hotel, and that he was offered \$225 per month for it, but that Mrs. Manciet, being a joint executor, and having equal authority with himself, would on no account consent to it. Under these circumstances, I doubt very much if Bigne is chargeable with rent, though he continued to occupy the building. He was not bound to desert it in order to relieve himself of the rent. And it may be questioned whether or not a preponderance of the evidence proves that the rental value of the St. George Hotel was three hundred dollars per month. But these considerations in favor of Bigne are again met by claims quite as well sustained on the other side, all of which no doubt were duly weighed and considered by the learned county judge of Multnomah County in passing upon the evidence and the accounts. So long a time has elapsed since most of the events involved in this controversy happened that we cannot hope to reach the whole truth, or to exact justice between these parties. The most we can expect to accomplish is to do approximate justice. Their methods of business throughout the whole course of the partnership preclude anything more than that. In addition to this, Bigne and Manciet were the most intimate friends. Manciet knew Bigne, and trusted him fully, confiding everything to him in the settlement of the estate in the most unreserved manner. Under these circumstances;

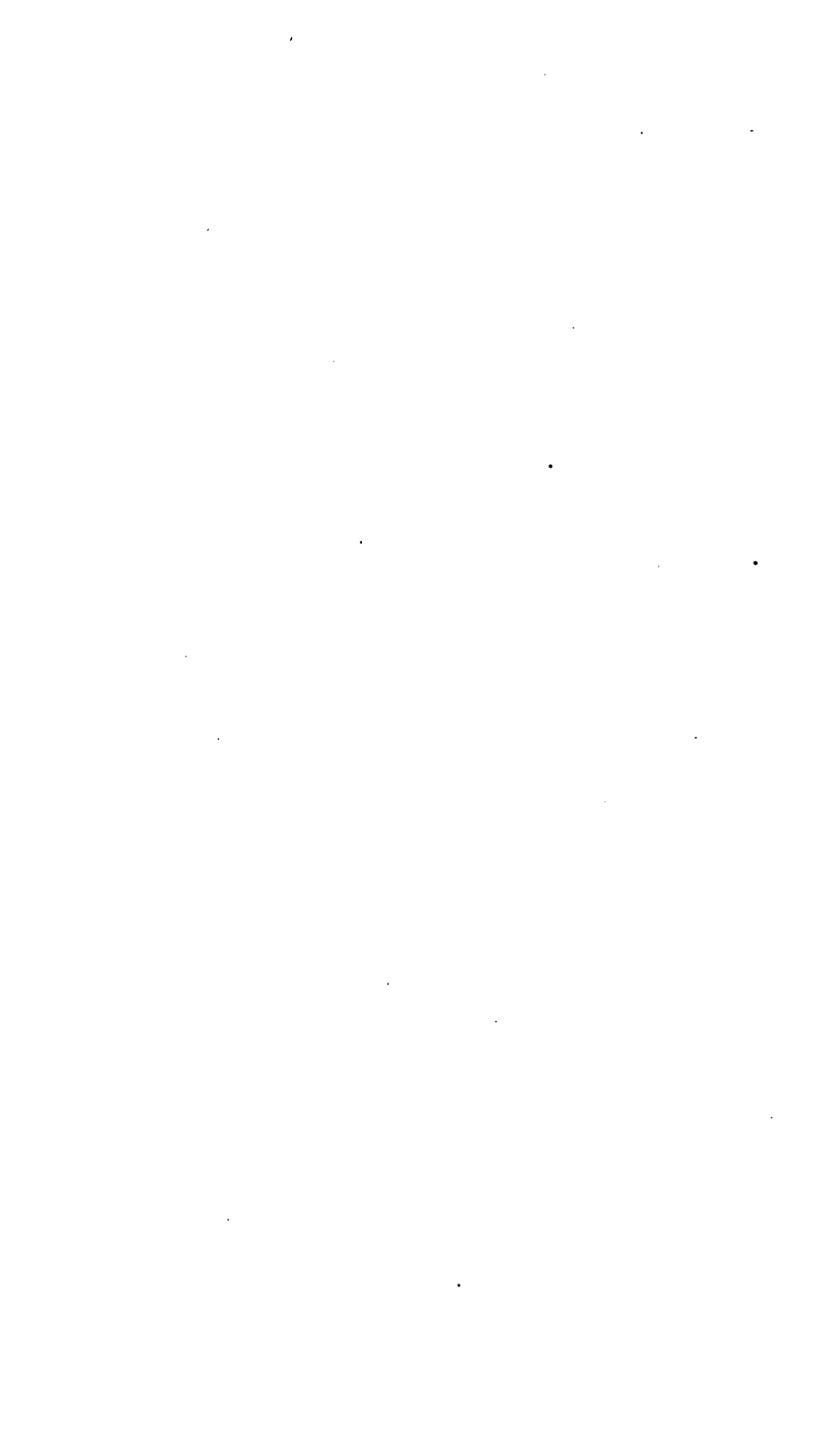
nothing short of treachery and willful falsehood on Bigne's part would justify the court in adopting the theories of counsel for the legatees in relation to Bigne's conduct.

3. Something was said by counsel for the legatees in relation to the inequality of the advances made by Bigne to some of the said legatees, but that can be considered when the county court shall come to make its final decree of distribution. It is an equity arising between such legatees, to be adjusted and settled upon a final settlement of the estate. Bigne has no interest in that question in the present state of the record.

4. All the parties to this controversy are equally interested in its settlement, and litigation for that purpose seems to have been necessary. The cost of the litigation will therefore be first paid out of the fund in court. All matter of form was waived by counsel, and we neither considered nor decided anything except the state of the accounts.

After giving the case the fullest consideration, we have concluded to affirm the decree, not however, without a consciousness that the result may fail to give some of the parties as much as they ought to receive; but the facts are limited by time, the books are incomplete, the business seems to have become complicated in many ways not here alluded to, and which could not now be unraveled and explained.

Let the decree be affirmed.



MARCH TERM, 1889.



CASES
ARGUED AND DETERMINED IN
THE SUPREME COURT
OF
OREGON.

MARCH TERM, 1889.

[Filed March 13, 1889.]

**J. S. HALL, RESPONDENT, v. ZELLER BROTHERS, AP-
PELLANTS.**

FORMER ADJUDICATION — ESTOPPEL. — Where a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact.

VERDICT. — In an action where there are numerous issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every question of fact at issue.

ITS EFFECT. — Where some specific fact or question has been adjudicated or determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not.

Doud & McCoy, for Respondent.

Watson, Hume, & Watson, for Appellant.

STRAHAN, J. — For his first cause of action, the plaintiff alleges that on the fourth day of March, 1887, plaintiff

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and defendants entered into an agreement in writing, by the terms of which it was in substance agreed between said parties as follows: That the plaintiff was to furnish a mill-site, and to furnish logs to the same, for the sum of \$2.75 per thousand feet, of good quality fir, such as the railroad company will accept for ties, and to the amount of six thousand feet per day, in all about eight hundred thousand feet. That defendants were to erect a saw-mill on said site, and to pay said price for the quality of timber above named. Payments to be made as the railroad company makes them on any sales that may be made, and when the above amount of lumber has been sawed, to quit, and deliver up the said premises in reasonable order, the mill to be moved away by the defendants, leaving the slabs that are not used on the premises. It is then alleged that the mill was erected on said premises under said contract, and plaintiff cut and furnished a considerable amount of timber, and delivered the same under said contract to the said defendants, and on the twenty-fifth day of October, 1887, the defendants having neglected and refused to pay plaintiff for so much of said timber so delivered which by the terms of said contract was at that time due, commenced an action against the defendants to collect the same in connection with several causes of action. That since said action was commenced against said defendants, they have sold fifty-four thousand feet more of the timber so delivered to them by the plaintiff under said contract, and that by the terms of said contract the same has become due and payable to the plaintiff at the rate of \$2.75 per thousand feet, and defendants have neglected and refused to pay, etc. A second cause of action is for negligently and wantonly breaking down a *considerable portion* of plaintiff's fence, and for refusing to repair the same, to plaintiff's damage in the sum of twenty dollars. A third cause of action is for wantonly

and maliciously destroying about twenty cords of slabs, contrary to the terms of said contract, to plaintiff's damage in the sum of twenty dollars, and for selling ten cords of slabs, to plaintiff's damage in the sum of ten dollars.

The defendants demurred to the complaint upon several grounds, which being overruled, they filed their answer. By their answer the defendants deny that they have sold fifty-four thousand feet, or any greater amount than forty-six thousand feet, of the timber delivered to them by the plaintiff under said contract since the commencement of the former action mentioned in the complaint, and they deny that any other or greater sum than \$126.50 is due now or ever was due the plaintiff thereon.

Each of the other causes of action are specifically denied. The answer then alleges, by way of counterclaim to the causes of action stated in the complaint, that over six thousand feet of logs delivered to them by plaintiff under the written contract set out in the complaint were not of good quality of fir, such as the railroad company would accept for ties, and were not of good quality fir, such as were fit or suitable for railroad ties, but were unsound and decayed, and that the lumber manufactured therefrom was unsalable at the ordinary rate; but that the defendants were compelled to sell the whole six thousand feet for the sum of twenty dollars, which was the highest price that could be procured for the same, and all it was reasonably worth. That the market value of good merchantable ties was eight dollars per thousand feet, and that said railroad company would have accepted said six thousand feet of ties, and paid that sum therefor, had the same been of suitable material. That said six thousand feet of lumber are contained in said forty-six thousand feet of lumber sold since the commencement of said previous action, and that by reason of said loss defendants have been damaged in the sum of twenty-eight dollars.

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For a second counterclaim, the defendants allege, in substance, as follows: That on or about the 1st of March, 1887, they entered into an agreement with the plaintiff, wherein and whereby they promised and agreed to and with the plaintiff to furnish a steam saw-mill, and set the same up on the plaintiff's land, about ten miles distant from Portland, Oregon, and begin to run and operate said saw-mill on said land within a reasonable time from said date, and saw and manufacture at said mill all the lumber and timber at said place which he might require for a barn, fencing, and other improvements on his said land, and not less than seventy thousand feet, at the usual market prices therefor. And the plaintiff, in consideration of the promise and agreement of the defendants, did promise and agree to and with the defendants to take and receive from them at their said mill, and as soon as the same could be conveniently sawed and manufactured thereat, not less than seventy thousand feet of lumber and timber for said barn and other improvements on his said land, and pay the defendants the usual market price therefor; that in consideration of said promise and agreement on the part of the plaintiff, and in reliance thereon, the defendants did, at great expense, procure a steam saw-mill, and erect the same on the plaintiff's said land, and begin to work and operate the same according to said agreement, on or about the 1st of June, 1887; that thereafter and prior to April 1, 1888, at divers times, and whenever required by plaintiff, the defendants sawed and manufactured at their said saw-mill on said land large quantities of lumber and timber for the plaintiff for his said barn and other improvements thereon, and upon his orders therefor under said agreement, amounting altogether to eleven thousand feet, delivered by them to the plaintiff under said agreement, and accepted by him; and during said entire period defendants were able, ready, and willing

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to saw and manufacture the remainder of said seventy thousand feet, namely, fifty-nine thousand feet, for the plaintiff, according to the terms of said agreement and repeatedly notified and requested the plaintiff to give them his orders therefor, which plaintiff wholly failed and neglected and refused to do, except said eleven thousand feet; and the plaintiff notified the defendants that he would not furnish any further orders or bills for lumber or timber, or receive any further quantity thereof, upon said agreement, and on or about said April 1, 1888, notified the defendants to quit and surrender up to him the possession of said mill-site and premises occupied by them, and threatened to commence an action to enforce their removal therefrom; that by reason of said notice and threat, they were compelled to and did, on or about said date, remove from said premises, and surrender possession thereof to the plaintiff. It is then alleged that by reason of said neglect, failure, and said other wrongful acts and misconduct of plaintiff, the defendants were hindered from further performing their said agreement, and were prevented from manufacturing said remainder of fifty-nine thousand feet of lumber and timber for the plaintiff, and were prevented from making the profit thereon, to their damage in the sum of \$177; that the usual market price for lumber and timber to be furnished by the defendants to the plaintiff under said agreement was eight dollars per thousand feet, and for the eleven thousand feet received by plaintiff as aforesaid, the sum of eighty-eight dollars; and though often requested, plaintiff has failed and refused, and still does fail and refuse, to pay the same, etc.

The plaintiff, replying to the defendants' first counterclaim, pleads, by way of release and estoppel, that the defendant ought not to be admitted to allege that they had been damaged in the sum of twenty-eight dollars by plain-

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tiff delivering to them over six thousand feet of logs which were so unsound as not to be suitable for railroad ties, etc.; because on or about October 1, 1887, plaintiff and defendants entered into a contract whereby the defendants, for a good and valid consideration, agreed to release plaintiff from the logging contract between them, and from all liability under the same; and after plaintiff had been released from said logging contract, and had ceased to deliver logs to the defendants under the same, plaintiff commenced an action on the twenty-fifth day of October, 1887, against the above-named defendants in said circuit court, to collect the amount then due plaintiff for furnishing and delivering logs under said contract to the defendants, and the defendants did set up as a defense and set-off to plaintiff's causes of action arising under said logging contract in said action a claim for recoupment for all damages they, the said defendants, had sustained through or by the fault or neglect of the plaintiff in performing said logging contract; that such damages were put in issue in the aforesaid action, and were fully considered and passed upon by the jury in their verdict, and that a judgment was duly rendered and given on said verdict, which remains in full force. The reply then contains denials of the first counterclaim. The reply to the second and third counterclaims is substantially the same as to the first. The jury found a verdict for the plaintiff for the sum of \$148.50, upon which judgment was rendered, from which judgment this appeal is taken.

The notice of appeal contains numerous assignments of error, amongst which are error of the court in admitting the judgment roll No. 13,496 in the former action No. 7,862, between the same parties, as evidence before the jury, to estop the defendants from denying or disproving that the quantity of lumber on hand and unsold from the saw-logs delivered by plaintiff under the written contract

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of March 4, 1887, at the time of the commencement of said former action, was only forty-six thousand feet, or any less quantity than fifty-four thousand feet, and in holding and ruling upon the trial that defendants were estopped thereby; error of the court in excluding the evidence offered to prove that the quantity of such logs was only forty-six thousand feet, and not fifty-four thousand feet; error on the part of the court in refusing to allow defendants to prove the contract in relation to their sawing lumber for plaintiff for barn and other improvements about his place.

The judgment roll in the former action was offered in evidence by the plaintiff. One of the allegations in the defendants' answer in the former action which is claimed to work an estoppel in this is as follows: "They admit that on March 4, 1887, they entered into the written contract with the plaintiff mentioned in the seventh cause of action in the complaint; and admit they were to pay the plaintiff \$2.75 per thousand feet for furnishing the timber for, and cutting and hauling saw-logs to, their said steam saw-mill; but they allege that in and by said written contract it was expressly stipulated and agreed between the plaintiff and defendants that no sum of money for or on account of furnishing said saw-logs at their said steam saw-mill, under said written contract as aforesaid, should become due or payable to the plaintiff from the defendants until after they had sold the lumber or timber manufactured from said saw-logs, and collected the price thereof, and only as such sales should be made and the price received by them, and in the proportion to the amount thereof. And the defendants allege that the plaintiff delivered to them under said contract 165,000 feet of saw-logs and no more, but that only 109,930 feet of the lumber and timber manufactured by them from said saw-logs have been sold and the price thereof received

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by them," etc. This is perhaps enough of the answer in the former action, which it is claimed by the plaintiff creates the estoppel relied upon, to present the question. But in addition to the pleading, the court charged the jury upon the trial that the effect of such former record was to estop and preclude the defendants in this action from alleging or proving upon this trial what was the actual quantity of lumber on hand and unsold from the saw-logs delivered by plaintiff under the written contract of March 4, 1887, at the time said former action was commenced.

1. The first question demanding attention is, What was the effect of the judgment rendered in the previous litigation between the parties? Having alleged in the former suit that they had on hand fifty-four thousand feet of lumber which remained unsold, are they thereby precluded from now alleging that the amount in fact was only forty-six thousand feet? To support their contention, counsel for the respective parties have cited many authorities, which have been examined by the court; but they do not seem decisive of the question presented. All concede that when a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact. The rule is undisputed, but the difficulty lies in its application. The matter now relied upon was pleaded in the former action for the purpose of reducing the plaintiff's recovery in that action. For that purpose it was put in issue and tried. It must be intended that the verdict of the jury covered all the issues made in that action. The quantity of lumber which the defendants had on hand, and which had been sawed from timber delivered by the plaintiff under the written contract, was one of the issues, and I am unable to perceive why the judgment rendered does not conclude that ques-

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tion in the same manner that every other issue of fact in the case is concluded. The effect of the authorities, I think, is, that the estoppel in such case is complete. (*Hanna v. Read*, 102 Ill. 596; *Tilley v. Bridges*, 105 Ill. 336; *Radford v. Folsom*, 3 Fed. Rep. 199; *Reynolds v. Babcock*, 60 Iowa, 289; *Heroman v. Louisiana Inst. of Deaf and Dumb*, 34 Iowa, 805; *Price v. Dewey*, 6 Saw. 493; *Good-nough v. Litchfield*, 59 Iowa, 226; *Vanlandingham v. Ryan*, 17 Ill. 25.)

In *Hanna v. Read*, *supra*, the principle is thus stated: "Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue on a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not." Counsel for appellant, in effect, insist that there can be no estoppel in this case, for the reason that the answer in the former action presented a number of separate defenses, and the complaint therein contained a number of causes of action, so that the record lacks that degree of certainty necessary to create an estoppel.

In support of this objection they cite *Russell v. Pace*, 94 U. S. 606. But the principle of that case can have no application here. There is no uncertainty in the case before us what matters were litigated and determined in the former action. They are fully disclosed by the record.

In such case, says Herman on Estoppel and Res Judicata, volume 1, section 111: "The estoppel of a judgment covers the whole matter in dispute in the cause in which it is rendered, and to every point decided between the parties in the course of the proceedings which led to the judgment. The judgment itself operates as a bar, and the decision of a particular issue as an estoppel, but their conclusive

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effect is the same, and depends upon the principle of *interest reipublicæ ut sit finis litum*. In order to make a judgment effectual as an estoppel, the cause of action must be substantially the same; it must be sustained by the same evidence, although the form of the action may be different. But the estoppel of an issue on a particular point, or of the judgment itself, as to the point which it decides, will be conclusive as to the points in any subsequent proceeding, whether founded on the same or a different cause of action." And section 247 of the same work says: "The estoppel of a judgment extends beyond what appears on its face; it includes every allegation made by the plaintiff and denied by the defendant; it extends to every fact in issue between the parties that was adjudicated in the action; and while it not only proves and establishes the case of the successful party, it denies and refutes that of the other." The only question presented on this appeal is as to the effect of the record in the former litigation between the parties, upon their right in the present action in the particular mentioned, and on that question I think the court did not err.

It would be unsafe to relax the well-established rule as to the effect of judicial records. Rights of property and the repose of society depend upon them, and the safer and better rule, as well as the sounder policy, requires that the same should be adhered to. These views lead to an affirmance of the judgment.

THAYER, C. J., concurred; LORD, J., expressed no opinion.

Statement of Facts.

[Filed March 19, 1889.]

W. A. McCARTY, RESPONDENT, v. J. B. WINTLER,
APPELLANT.

MOTION TO AFFIRM JUDGMENT OF CIRCUIT COURT—WHEN APPEAL ABANDONED.—A motion to affirm the judgment of a circuit court, when the appeal has been perfected and abandoned, will only be allowed on notice to the opposite party in accordance with the rules of this court. Such motion is not *ex parte*.

FILING OF TRANSCRIPT ON APPEAL—TIME FOR SAME—DISCRETION OF COURT.—The transcript on appeal must be lodged with the clerk of this court by the second day of the term next following the perfection of the appeal. The court has no discretion to permit it to be filed thereafter.

PETITION for an order to recall mandate, and to permit appellant to file transcript.

Judgment having been recovered in favor of respondent and against the appellant herein, which was entered in the circuit court for the county of Multnomah, on the nineteenth day of October, 1888; and the said appellant having afterwards, and on the twenty-ninth day of October, 1888, taken and perfected an appeal therefrom to this court, but having failed to file the transcript by the second day of the next term thereof, as provided by statute,—the said respondent brought into this court copies of notice of appeal and undertaking as provided by rule 7 thereof, and upon an *ex parte* showing obtained a formal judgment of affirmance of the judgment appealed from, entered against the appellant and his sureties, with ten per cent damages, and the case was remanded to the said circuit court. The appellant, upon ascertaining that such proceedings had been taken against him, presented the said petition.

Gearin & Gilbert and N. H. Bloomfield, for the motion.

J. C. Moreland, contra.

17	391
24	439
21*	195
33*	983
17	391
27	75
28	306
28	445

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The COURT. — The appellant's counsel contend that rule 9 requires notice to be served upon the opposite party, to affirm a judgment in cases where the appeal has been abandoned; and that it is within the discretion of this court to permit a transcript to be filed after the second day of the term at which it is required to be filed. They insist therefore that the mandate shall be recalled, the transcript filed, and the case set for hearing. They claim that the neglect to file the transcript within the time required by the code was excusable, and have filed affidavits to show that it occurred through inadvertence; that they had taken the appeal in good faith, had prepared their brief, and were intending to appear and argue the case whenever it should be set for hearing.

We are satisfied that rule 9 does require that notice should be given in such cases as contended for by appellant's counsel, and that if the facts set forth in the affidavits had been before the court when the motion for the affirmance of the judgment was made, we should not have granted the ten per cent damages; but we could not have allowed the transcript to be filed without overruling a number of decisions heretofore made by this court.

Upon an appeal to this court being perfected, the appellant must, by the second day of the next regular term of the court thereafter, file with the clerk thereof the transcript of the cause, and thereafter the court has jurisdiction of it, and not otherwise.

This is substantially the language of the code, and is a condition to the right to have the appeal heard. Nor has the appellant a right to take a second appeal from the judgment of a circuit court where one has already been taken and perfected, though the rule is different where an attempt is made to take an appeal, but in consequence of some irregularity the appeal is not perfected.

We think, however, that the appellant, in view of the

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facts referred to, should not be charged the ten per cent damages. An order will therefore be entered directing that the mandate heretofore issued herein be returned to this court, unless the respondent elect to remit, and does remit, the ten per cent damages, amounting to fifty dollars, from the judgment as affirmed by this court.

[Filed March 25, 1889.]

MARX AND JORGENSEN, RESPONDENTS, v. E. M. CROISAN, APPELLANT.

PLEADING—DEMURRER—REPLEVIN.—When a defendant wishes to challenge the authority of a court to try an action in replevin in the county in which such action is brought, unless it was alleged in the complaint that the property was taken in such county, he should distinctly specify that objection in his demurrer, and thereby call the attention of the court to the point he asked to have decided.

WHEN A DEFENDANT DEMURS TO A COMPLAINT on the ground that the facts stated do not constitute a cause of action, and the court overrules such demurrer, and the defendant refuses to further plead, and the court renders judgment against him, he waives the right to urge thereafter such dilatory matter as an omission to allege the county or venue in the complaint in replevin. Nor does the objection specified in the demurrer apply to defects of a dilatory nature, but is limited to the subject-matter proper of the action.

WHEN IN A COMPLAINT IN REPLEVIN the goods were alleged to have been taken in a certain store in the city of Salem, without stating the county or state, the court will take judicial notice that the city of Salem is the county seat of Marion County, and the capital of Oregon, and is located within said county and state.

APPEAL from Marion County.

N. B. Knight, for Respondents.

William Kaiser, for Appellant.

LORD, J.—This was an action in replevin. A demurrer was filed to the complaint, and specified as the grounds

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thereof, "that the same does not state facts sufficient to constitute a cause of action." The court below overruled the demurrer, and the defendant refusing further to plead, judgment was rendered for the plaintiff. The objection is, that the complaint does not allege that the property seized was located in Marion County, in which the action was brought. It was argued that the action of replevin was local, and must be brought in the county where the property was taken and located, and that unless the complaint shows that the property was seized and situated in the county where the action was brought, it would be "fatally defective." But this objection and the argument based on it does not go to the sufficiency of the facts as a cause of action, but the right of the court to exercise its jurisdiction upon the facts, unless the complaint alleges that the property was taken and located in the county wherein the action was brought. It simply says in effect that, the action of replevin being local, the cause of action must be brought in the county where the property was taken and located, and that unless the complaint shows such fact by allegation, the court will have no jurisdiction of the subject thereof. The result then is, that the ground of objection specified in the demurrer, and upon which the court rendered judgment, is not the true or real one now assigned and relied upon to reverse that judgment. At common law the cause of error here assigned was taken by special demurrer. Replevin was said to be local because it is necessary to give a local description of the taking complained of, and perhaps for the further reason that it is a proceeding partly *in rem*.

"In declaring in replevin, it is necessary to describe, and describe truly, the *locus in quo*, i. e., the close, house, or common, in which the cattle or goods in question were taken by the defendant; and as the necessity of alleging the true place of caption involves the necessity of laying

the true town, parish, or ville, and of course the true county, the venue and county as well as the close, etc., are consequently *material*, and the action of necessity local." (Gould's Pleading, c. 3, sec. 111.)

Hence, in the action of replevin at common law, the place, parish, etc., are material and traversable, and if the place of taking, parish, or ville was not alleged, the defendant may demur, but the omission is cured by pleading over, or after verdict. (*Potter v. North*, 1 Saund., note 1, of authorities.) This is well illustrated in *Potter v. Bradley*, 2 Moore & P. 78; 17 Eng. Com. L. 625. There the action was in replevin, and the defendant demurred specially, assigning for causes that it was not alleged, nor did it appear by the declaration, in what particular place or places in the said parish the said cattle or any part thereof were taken. Upon the argument, the court said that "although where a plaintiff in replevin omits to name the particular place in the declaration, the defect may be cured by the defendant's pleading over or by verdict; still there had been no case in which it had been decided that the objection might not be raised by demurrer."

It is to be observed, however, that the objection was taken by special demurrer, and pointed out the matter omitted but required to be alleged in local actions, and consent was obtained to amend. Special demurrers, as known in the common-law practice, are now abolished, but the principle remains that "the demurrer shall distinctly specify the grounds of objection to the complaint," and "unless it does so, it may be disregarded." (Code, sec. 67.)

When, therefore, the defendant wished to challenge the jurisdiction of the court to try the cause of action in that county, unless the complaint alleged that the property was taken in Marion County, he should have distinctly specified that objection in his demurrer, and thereby

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called the attention of the court to the precise point he asked to have decided. This he had a right to do by demurrer, and must do, or the objection would be waived. But as the case stands, the demurrer is put on the ground that the facts alleged do not state a cause of action, yet the objection relied upon to reverse the judgment rendered is, that the action being local, unless the complaint shows that the goods were taken in Marion County, wherein the action was brought, the court will have no jurisdiction of the cause of action.

In some jurisdictions it has been held that judgment can only be given upon the cause assigned in the demurrer, and if it fails to assign or allege the proper cause, it wholly fails.

In *Wilson v. Mayor*, 1 Abb. 4, Ingram, J., said: "I can see no good reason why a demurrer should be allowed to state one cause of demurrer and succeed on another which has not been stated. The object of the legislature in requiring the demurrer to state the grounds of objection to the complaint was to give the opposite party notice of the alleged defect. The complaint and answer are required to contain a plain statement of the cause of action or defense. No form is necessary, and no technicalities are encouraged, and the same system applied to the demurrer requires that it should plainly state the ground on which the demurrant rests his objection to the pleading. The object of the demurrer is to raise an issue upon the law, as the answer does upon the facts, and upon the trial the court is confined to that issue. It can never be upheld as an orderly proceeding in a court, while trying an issue of law, to find upon that issue in favor of one party, and to hold that there were other reasons, not involved in the issue, why judgment should be rendered against him."

In *Hobart v. Frost*, 5 Duer, 673, the demurrer specified as its only ground that the complaint did not state facts

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sufficient to constitute a cause of action, and the argument in its support was, that it appeared on the face of the complaint that the judge making the order for the appointment of the receiver had no jurisdiction, etc., and the court held, "that if the objection to the jurisdiction were valid itself, it would not be taken under a demurrer specifying as its only ground that the complaint did not state facts sufficient to constitute a cause of action. The ground that ought to have been specified to enable the court to listen to the objection was, that the plaintiff had not legal capacity to sue. The facts set forth in the complaint were plainly sufficient to constitute a cause of action. The objection was not that the action was not maintainable at all, but that the plaintiff had not a personal right to maintain it."

It is true that the decisions in these cases are not of courts of last resort, and are not usually regarded by conclusive authority. Nor is it necessary for us to approve them, or go to that extent; yet there can be no doubt but that in a case like the present, where the facts are sufficient as a cause of action, and the objection raised is not specified, that it must be considered as waived and disregarded.

The judgment is affirmed.

ON PETITION FOR REHEARING.

[Filed April 9, 1889.]

LORD, J. — The argument in the motion for rehearing evidently misconceives the ground upon which the opinion is based, and necessarily renders inapplicable the authorities cited to sustain it. Two things may be noted at the outset, that there is nothing in the opinion to indicate or warrant the inference that where a complaint fails to state a cause of action, or the court does not have jurisdiction of the *subject-matter* thereof, that advantage

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cannot be taken of it at any time and in any court. The objections, when well taken, are always "fatally defective," and are never waived; but a different rule prevails when the objections raised are only dilatory and in abatement, and do not involve the sufficiency of the facts to constitute a cause of action, or the jurisdiction of the court of the subject of the action.

In the case in hand, the complaint was in replevin, which the defendant demurred to, on the ground that the facts stated did not constitute a cause of action, but the defect pointed out and argued under this objection, in this court, was, that the action being local, the complaint was incomplete or defective in omitting to allege the venue or county in which the goods were taken. The venue in replevin, at common law, being local, it was necessary to allege in the declaration the county where the goods and chattels were taken. The venue is the locality or county in which the cause of action is to be tried, and is synonymous with the "place of trial." (*Hinchman v. Butler*, 7 How. Pr. 462.) The object of the venue is to designate the county or place of trial in which the action is to be tried. It has no reference to the sufficiency of the facts as a cause of action; these are the wrongful taking of another's property. Nor does the omission go to the jurisdiction of the subject of the action, but contests and denies the right of the court to exercise its jurisdiction unless the venue or county is alleged in the complaint. It seeks to abate the action,—to suspend further proceedings,—unless the county is stated. That an action in replevin is a subject within the jurisdiction of the circuit court, every lawyer will admit, but when the action is local, as in replevin, before the court is authorized to take jurisdiction of such actions, unless waived, the venue must be stated in the complaint. But the fact that it may be waived, or is cured by pleading

over, is conclusive of the point that it does not go to the substance of the facts, or the subject of the jurisdiction. It is an objection that may be taken advantage of by demurrer or answer in some jurisdictions, but, however, pleaded in abatement, the pleading must specify the objection, and the attention of the court must be called to the point asked to have decided. In a word, the elementary fact that such a plea is dilatory, and in abatement of the action, is decisive that it does not touch the sufficiency of the facts as a cause of action, or that the subject-matter is not within the jurisdiction of the court. When, therefore, the defendant, by his demurrer, specified as the ground thereof that the facts stated did not constitute a cause of action, and the court overruled it and rendered judgment against him because he refused to further plead, his objection being confined to the cause specified, he necessarily waived all dilatory pleas, and, consequently, cannot take advantage now of the omission to allege the venue. The reason is, that the cause of the demurrer is limited to the subject-matter *proper* of the action, namely, the wrongful taking of the goods of the defendant, and has no application to any dilatory matter whatever, such as the omission to allege the venue, or incapacity to sue. (Green's Pleading and Practice, sec. 909, and cases cited.)

Nor is there anything in the principle as applied to the facts as presented by this record inconsistent with *Hotchkiss v. Elling*, 36 Barb. 50. Nor does this case overrule, as I read it, the cases cited, but the purpose was to limit and restrict the opinions to the facts upon which they proceeded. What the court objected to in *Hotchkiss v. Elling*, *supra*, was the inferences sought to be drawn from the cases referred to, and not what was decided by them. The contention was, that the objection specified in the demurrer, that the facts did not state a cause of action, waived a want of jurisdiction in the court to grant the

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relief sought, that the objection to the jurisdiction, not having been taken specifically for that cause under subdivision 1 of section 144 of the code, that the court has no jurisdiction of the subject of the action, but the objection being under subdivision 6 for a different cause, namely, that the complaint does not state facts sufficient to constitute a cause of action, it cannot be entertained on demurrer, and the cases cited were referred to in support of that view.

When this argument was pressed upon the court, as the proper inference to be drawn from those cases, Hogeboom, J., responded, that "if they are intended to apply to a case like the present, I cannot yield my assent to them." That is to say, if the doctrine of those cases were to be carried to the extent that a demurrer, specifying that the facts stated did not constitute a cause of action waived, or precluded the right to raise the objection that the court did not have jurisdiction of the person or subject-matter, then as those cases were not conclusive on that court, he should not assent to them. The reason was obvious. These are incurable objections, when well taken, and which, whether the objection be specified or not, is never waived, and cannot be disregarded.

It may be admitted that the opinion of the court, as expressed in these cases, was liable to the objection urged, and was broad enough to include incurable matter, as a want of jurisdiction of the subject-matter, but when read in the light of the facts to which it applied, it did not relate to incurable defects, or matters without the jurisdiction of the court. In *Hobart v. Frost*, 5 Duer, 672, the quotation made was for the purpose of illustrating that a demurrer, specifying as its only ground that the complaint did not state facts, etc., did not apply to the objection that the plaintiff has not legal capacity to sue.

In *Fulton etc. v. Baldwin*, 40 N. Y. 648, it was held that,

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on demurrer that the complaint does not state facts sufficient to constitute a cause of action, the defendant cannot object that the plaintiffs have not capacity to sue; but to avail himself of this objection, it should be specifically set forth as a cause of demurrer. The court say: "The complaint states a good cause of action, but does not allege that the plaintiffs are a corporation having capacity to sue. This objection must therefore be regarded as waived. It is just and reasonable that the rule should be so. If this objection to the complaint is well taken and the defendant had specified this ground of demurrer, the plaintiff would most probably have amended his complaint, and inserted proper averments to show them a corporation having authority to sue." (See also Green's Pleading and Practice, sec. 909.) But however this may be, it does not affect the principle involved in the case, and it was expressly avowed in the opinion that it was not necessary for us to approve them to sustain the view there taken in order to avoid liability to misconstruction.

At common law, a general demurrer lay to defects of substance, and a special demurrer for defects as to matters of mere form, and from the reign of James I., when *Reade and Hawke*, Hob. 16, was decided, down to the reign of George IV., when *Potter and Bradley*, 2 Moore & P. 78, was decided, the objection here raised as to venue was taken by special demurrer, showing that it did not go to defects of substance, but only to matters of mere form, and therefore related to such matters as was curable or amendable.

And so the principle still is, that the objection does not go to the substance, either of the jurisdiction or of the cause of action, but is dilatory, and intended, when specified, to abate the action, unless the complaint be amended and the proper averment of venue be alleged.

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It must be said, however, that the rule itself is criticised as highly technical, and as the court in *Strong v. Lawler*, 33 Conn. 177, declared, that it was not supported by satisfactory reasons, and should not be extended.

When therefore the defendant by his demurrer pleaded that the complaint did not state facts sufficient to constitute a cause of action, he waived the right to urge such dilatory matter as failure to allege the venue, whether for the taking or detention, or both, now or then. To avail himself of that objection, it must be specified and exerted before a demurrer to the substance, which is, in effect, in bar of the action. Nor can he allege in his demurrer the cause specified, and compel the court to pass upon it, and then raise an objection under it, to which it does not apply.

This view is conclusive of every phase of this case, and we should not have deemed it necessary, in overruling the motion, to have restated our reasons but for the earnestness and good faith with which the learned counsel press their motion, and the opportunity to say that in our judgment the objection sought to be raised is not only not tenable, but is without even technical merit.

It is an elementary rule that courts of law are bound to recognize the territorial divisions of the state into counties, towns, or cities. By public law the city of Salem is made the capital of the state and the county seat of Marion County, and the court is bound to take judicial notice of the same. The court itself is required to hold its terms when doing judicial business in the county seat of Marion County, which is known judicially to be the city of Salem. When then the act complained of was alleged in the city of Salem, the court will take judicial notice that said city is within that county, and is its county seat.

In *Gager v. Henry*, 5 Saw. 237, the court, through Mr.

Justice Deady, held that the court takes notice of the existence of the political subdivision of Oregon called Yamhill County, and that Lafayette is the county seat thereof, and therefore a notice to sell lands at the courthouse in Lafayette is notice of a place of sale in Yamhill County.

In *State v. Powers*, 25 Conn. 50, Ellsworth, J., said: "It is said that the complaint does not state that the offense was committed within the county of London. Stonington is the place named, and the time of committing the offense is named; and although the county is not named, we can judicially take notice of that, which is sufficient."

In *Harding v. Strong*, 42 Ill. 149, the court say: "The objection to this judgment is purely technical. It is first insisted that the court cannot know that the lot in controversy is in the city of Monmouth, Illinois. The court will take notice that the city of Monmouth is in Warren County in this state."

In *Railroad Co. v. Case*, 15 Ind. 42, the action was local, and the statute required that it should be brought before some justice of the peace of the county in which the animal was killed. The objection was, that it was not proved that the injury was committed in Shelby County, and the court said: "No witness stated that the animal was killed in that county; yet several stated that it was killed on the railroad between two named geographical points, which we will judicially notice are in that county."

In *Loutham v. May*, 77 Ind. 109, the action was in replevin, and the court say: "It is contended with much earnestness that the appellee failed to make out his case, for the reason that the evidence did not show that the property in controversy was detained in the county of Cass. We need not examine or decide it was essential that the property should have been shown to have been detained in Cass County, for the evidence fairly shows

Points decided.

that it was detained in the city of Logansport, and that city the court judicially knows is the county seat of that county." (See also *Vanderwerker v. People*, 5 Wend. 530; *Martin v. Martin*, 51 Me. 366.)

To this effect cases might be indefinitely multiplied, but these are sufficient to conclude this point. It was stated that the complaint did not show that the property was in the city of Salem when the action was commenced. It states that the defendant wrongfully took the goods out of a store in the city of Salem, and still detains them. Where? Why of course the place named, the city of Salem,—took them in the city of Salem, and still detains them (in the city of Salem). There is no use of repetition, unless some other place was to be named. So that in whatever view we may regard this objection, it cannot affect the result reached.

[Filed March 25, 1889.]**WRIGHT, APPELLANT, v. SHINDLER, RESPONDENT.**

RIGHT TO MAINTAIN DAM — EFFECT OF DEEDS. — The effect of the deeds offered in evidence was to vest in the defendants the right to keep and maintain a dam ten feet high above low-water mark at the place described, on Johnson's Creek, in Multnomah County.

CASE ADJUDGED. — An examination of the evidence leads to the conclusion that the present dam, maintained by the defendants on Johnson's Creek, is of the same height as a former dam; that the defendants and those under whom they claim had not destroyed or changed the land-marks, and that the maintenance of the dam by defendants is not wrongful, and that plaintiff's land is subject to whatever flowage a dam ten feet high at low-water mark at the point described may produce or cause.

APPEAL from Multnomah County.

R. H. Thornton, for Appellants.

R. & E. B. Williams, for Respondent.

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STRAHAN, J. — The object of this suit is to enjoin the defendants from maintaining a certain mill-dam at a height which causes the plaintiff's land to be overflowed, and also to recover damages caused by such flooding. Prior to 1866, Jacob Wills owned two parcels of land on Johnson's Creek, at Willsburg, in Multnomah County. In the year last named, he deeded one parcel to Lewelling and Baird, their heirs and assigns, with the right to keep and maintain a dam across Johnson's Creek ten feet high above low-water mark, at the site of the old mill on said premises known as Wills's mill. In 1879, Lewelling and Baird conveyed the same premises to the defendants, with the same rights as to maintaining the dam across Johnson's Creek. In 1870, Jacob Wills conveyed the other parcel of land, which was above and adjacent to the tract then owned by the defendants, to E. P. Wright, one of the plaintiffs.

In 1875, Wright conveyed to Jane Glass, who, in 1883, reconveyed to Wright, who, in 1885, conveyed the same premises to Delia, his wife. In March, 1883, the dam which had previously existed on said stream at said point was carried away by a flood. In the summer of 1883, the defendants rebuilt said dam at the same place. The plaintiffs allege that respondents erected said dam in 1883, fourteen inches higher than the one which had previously existed there.

The respondents denied that said dam was any higher than the old dam at the same place; and the referee found "that the said dam, rebuilt as aforesaid by defendants herein during the said year of 1883, was so built ten feet high above low-water mark at the site of said old mill, and no higher, and at the time of the filing of the complaint herein said dam was being maintained by said defendants at said height, and no higher."

While the old dam existed, and while Jane Glass held

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the title to the land, she instituted an action against the defendants to recover damages to her land caused by the old dam. In that action, the plaintiff alleged that the defendants had raised their dam to the height of eleven feet above low-water mark at the site of the old mill. The jury found that the dam, on the twenty-seventh day of September, 1877, when the action was commenced, was only ten feet high, and found for the defendants generally.

In 1874, while E. P. Wright held the legal title to said premises, he prosecuted a like action against the defendants, with the same result.

The present owner of the premises being in privity with Jane Glass and E. P. Wright, the defendants have pleaded each of said judgments as an estoppel against the plaintiffs, and as a bar against the prosecution of this suit; but it is not necessary to consider or pass upon the questions presented by those adjudications, for the reasons that the right of the defendants to maintain said dam in its present condition was not and could not have been litigated or determined in either of those cases, because it had not then been constructed.

If the question whether the defendant might lawfully maintain any dam whatever on said premises were involved here, or if the question were presented whether the defendants might lawfully maintain the same dam that existed at the time of the former litigation, then it is conceived that the judgments relied upon as estoppels would be of a conclusive nature upon the question litigated; they did settle conclusively and finally between the parties and their privies the questions litigated in those cases.

The course of the appellants' argument concedes these propositions; but their contention is, that the respondents, having the right to maintain a dam at the place named, have rebuilt it and carried it to a higher point

than the previous dam, and higher than they were authorized to do under the deed conferring the right. This reduces the controversy to one of fact, and requires a brief examination of the evidence.

1. The defendants, by virtue of the deeds offered in evidence, had the right to erect and maintain a dam at the place mentioned, ten feet high above low-water mark, and the only question is, whether this dam exceeds that height. The plaintiffs seek to maintain the affirmative of this question by referring to the testimony concerning,—1. The number of abutment logs visible above the dam; 2. A survey made by Messrs. Hurlburt and Ogilbie; 3. Spikes said to have been driven by Mr. Burrage, a surveyor; 4. The water line on the abutment logs; 5. A private stake on appellants' land; 6. The condition of that land before and after the dam of 1883 was built.

But none of the points, nor all of them together, clearly or satisfactorily sustain the plaintiffs' contention. Some of them have a bearing argument actively favorable to the plaintiff; others, when carefully examined in the light of the evidence, support the respondents' contention, to which a more particular reference will be made presently.

It is difficult to see how the parties could make so serious a controversy out of a fact that would seem to be susceptible of clear proof by actual measurement of the height of the dam. When its height is correctly ascertained, the controversy is practically at an end.

John E. Frick, a witness for respondents, says that he was in their employ from August, 1881, to April 10, 1886, as foreman and superintendent of the factory. Had charge of the dam during the time. It went out in March, 1883, all except the abutments. Respondents rebuilt it under supervision of witness. In rebuilding, nothing was done to the abutments, except to relay the top layer of timber twelve by twelve. The

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spikes were in the abutment during the time the old dam stood,—saw them driven. They were in the abutments during the whole time he worked in the factory. Saw them last in June last. They appeared as they formerly did, only more rusty, and the wood around them more decayed than it had been. When he last saw them, they appeared to be in the same position as when first seen. He had some difficulty in finding the spikes in the east abutment at the time he saw it last. The nail was in a decayed hole, and partly rusted away. About one inch of the nail was rusted away. Those spikes remained in the same position and were not removed during the time witness worked for respondents. They were on a level with the old dam. The dam built in 1883 was the same height as the old dam. There was no difference.

Seth Lewelling, another witness for the respondents, testified, in substance: "I think I built the dam that washed out in 1873 or 1874. Mr. Burrage made a survey at two different times. The first time, I did not take any marks, so that I had an idea when the survey came. The second time, he set his compass and gave me the height,—ten feet,—and drove spikes, one in each abutment, at the end of the dam. I drove the spikes a few inches from the planking, up the creek. The first survey was during the litigation with Wright; the second, while litigating with Jane Glass. Ten or twelve were there when the spikes were driven. Jake Wills was there. I drove the spikes; held the spike against the abutment, Burrage took sight, then I drove it in so that the head would just show. Jacob Wills and Edward Long were there. They were the principal men in building the abutment in the first place, and that is the reason they were chosen to examine it. I think the spikes were never changed. I found them where I was satisfied they were correct, some time after I had sold it. I examined the spikes after I

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heard of this lawsuit. I found one of them; the other one had been broken off by a drift or something at some time, but I could feel the piece that had been broken off in the hole with my knife. The west spike was plain. I believe they were in the same location at that time (after this suit was commenced) as first driven, as I found them without any trouble at all, from memory. Mr. Wright was there at that time. Don't think the present dam does any injury to the place of Mr. Wright more than the dam of 1877. Don't think the water is raised any higher. Don't see how it could."

This witness was recalled after having again examined the dam, and said, in substance, that he found both spikes as originally driven, and that he was satisfied they had not been removed; that they were in the same place; that the height of the present dam is the same as the old one, and that the present dam is not quite as high as the spikes.

Jacob Wills was also called by respondents, and testified, in substance: "Was present when Burrage made the survey in 1877 or 1878. Saw the spikes driven. Myself and Mr. Long established the low-water mark, the base from which he (Burrage) leveled the top of the dam. Knew where the low-water mark was at the site of Wills's old mill, which was standing. We established low-water mark by putting a block on the cross-timbers five inches thick, which represented a sawed apron two inches thick, which went up and down the stream, and also three inches depth of water of the natural flow at low water. The top of the block represented low-water mark at the site of Wills's old mill. Burrage took the level ten feet high from the top of this block at the time the spikes were driven. Between the survey made by Burrage in 1877 and the survey in 1887, the apron was covered with gravel and sawdust of varied thickness. By working away of the dam a portion

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of the foundation had been washed away when the survey was made in 1887. The apron was covered with this sawdust and sand, and when you dug down the water came up over it. The apron was nearly all gone and covered up. The apron was built in 1848. I have lived about a quarter of a mile from the dam for a quarter of a century, and have been familiar with the premises all that time. The old dam was a little below the level of the spikes,— a small fraction. The old dam and the present one were about the same height. Mr. Lewelling drove the spikes at the time of the Burrage survey. I have seen the spikes frequently since they were driven; saw them last day before yesterday; don't think they have been moved. The measurement made by Mr. Hurlburt and Ogilbie was not from the same base as the Burrage survey."

G. Shindler, one of the defendants, testified, in substance: "Bought the property in 1878 or 1879. Have seen the dam a good many times; you know it was blown out; it went out like a thunder-clap. John Frick was our foreman the night the dam went out. The abutments were the only thing left. No change has been made in the abutments except to remove the top logs, which were rotten, and put on new ones. I was shown the spikes after I bought. They are in the same place now they were then. I do not know of their being changed. I had the new dam built and had supervision of it; I do not think there is a particle of difference in the height of the present dam and the one that was washed out in 1883. I have visited the place a great many times since the dam was built. I was perfectly familiar with the old one. I saw these spikes two or three weeks ago. The spikes were there June 9, 1886, and have never been changed; the spike on the west side is perfectly plain; the one on the east side is broken off and rusty."

Job Williams also testified in behalf of the respondents;

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in substance: "Have known the premises for fifteen or sixteen years. Was familiar with the dam that went out in 1883. I helped rebuild the dam from the ground up. John Frick superintended the work. When we rebuilt the dam, the marks of the old dam were on the abutments and the spike. We went by this. The spikes were in the abutments that held a three-inch plank that ran up and down; that left a mark on that abutment to show how high the old dam had been. Now, in that abutment, there is a spike driven by a surveyor; we also had that to go by, so as not to get the gates of the dam too high. The old dam and the spike driven by the surveyor were the same height. There were two spikes driven by the surveyor, or one in each abutment. The spike in the west abutment was there when we rebuilt the dam in 1883; the head of the other was broken off, but the stub was in the wood. The height of the present dam compares with the one that was washed out in 1883 just as nigh as we could build it."

On the other hand, Mr. Wright and Mr. Clark, Jane Glass, and perhaps another, testify to seeing *new spikes* that had been driven into the abutments from eight to ten inches above where the Burrage spikes were driven, and the inference sought to be drawn from this is, that some interested party must have tampered with the Burrage spikes for some improper purpose. I do not think this evidence has sufficient strength and force to overcome the evidence offered on the subject of the spikes by the defendants. Wright and Miss Glass have both been taking part in this litigation for years, and from their situation and surroundings, their feelings were liable to be deeply enlisted, and they necessarily feel great anxiety as to the result; and Clark does not appear to possess any means of knowledge superior or even equal to the defendants' witnesses. I am therefore constrained to believe

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the version of the defendants' witnesses, in relation to the height of the new dam and the places where the Burrage spikes were driven, is the true one. And I think that the conclusion that the new dam is the same height as the old one is very materially fortified and strengthened by another circumstance. The plaintiff E. P. Wright and Jane Glass each, heretofore, prosecuted separate actions at different times against the defendants or their predecessors in interest to recover damages for the same land caused by the old dam backing water upon it. Their present contention is, that the new dam is higher than the old. The old dam caused the water to flow back on the plaintiff's land; the new did the same, and to, I think, no greater extent, so that the plaintiff's theory that the new dam was raised higher than the old is not sustained by the evidence. The value of the Hurlburt survey depends entirely on the question whether or not he found the true point of low-water mark. If he did not, the survey is of no value whatever.

From a careful consideration of all the evidence on that subject, I am led irresistibly to the conclusion he did not measure from the actual low-water mark named in the deeds. The actual point was difficult to determine after the lapse of time and changes that had occurred, and the fact that it differed essentially from the other measurements, made by those who had better knowledge and means of knowing, is sufficient to require us to give credit to the earlier survey and measurement instead of this one. I have been much interested in the able and exhaustive argument of appellant's counsel; but however persuasive his logic, it is overcome by a preponderance of the evidence, which must carry the case the other way. The decree of the court below must therefore be affirmed.

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[Filed March 27, 1889.]

CHURCH, RESPONDENT, v. MELVILLE, APPELLANT.

17	418
39	549
17	418
41	507

EVIDENCE — LETTER NOT A WRITTEN INSTRUMENT — RIGHTS OF THE JURY. —

It is the duty of the trial court to declare the legal effect of all written instruments submitted in evidence; but a letter is not generally such an instrument. To make it such, it must constitute a contract. An ordinary letter is to be dealt with by the jury like any other act, statement, or admission of a party; i. e., the jury is to give it such effect as they may think, under all the circumstances, it ought to receive.

LETTER — EFFECT OF AS EVIDENCE. — The letter written by the plaintiff in relation to the property in controversy was, under the circumstances, a fact to go to the jury on the question of title, to be weighed and considered by them, in connection with the other facts of the case, but it was not necessarily conclusive.

EVIDENCE — INSTRUCTIONS. — Unless evidence is by law conclusive upon the parties, it would be error for the trial court to select a single fact or part of the evidence where there was a conflict, and instruct the jury that they must find their verdict on that fact alone, and in a particular way. Such an instruction would be an invasion of the rights of the jury.

GOOD FAITH — PURCHASER OF CHATTEL — CAVEAT EMPTOR. — Good faith will not protect the purchaser of a chattel from one without title. In such case, *caveat emptor* is the rule.

APPEAL from Multnomah County.

Strong & Strong, for Appellant.

Sears & Beach, for Respondent.

STRAHAN, J.—This is an action to recover damages for the conversion of "a certain gold ring set with diamond," of the alleged value of \$135. The answer, after denying the allegations of the complaint, admits that the ring is of the value of \$110, and for that sum the plaintiff obtained a verdict and judgment, from which the defendant has appealed.

The notice of appeal contains the following assignments of error: "1. The court erred in not charging the jury that, from the evidence, it appeared that the plaintiff had, prior to the commencement of this action, voluntarily parted

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with his interest or title in the ring, the value of which is sought to be herein recovered, and hence could not recover in this action; 2. The court erred in not charging the jury that the plaintiff could not recover in this action; that, therefore, the verdict must be for the defendant; 3. The court erred in rendering judgment against the defendant." These assignments of error were based on the refusal of the court to give two instructions which the defendant requested, and to which ruling exceptions were duly taken. These instructions are as follows:—

"1. It appears from the letter of the 25th of February, 1888, introduced in evidence by the defendant, that the plaintiff had, prior to the commencement of this action, voluntarily parted with all his title or interest, if any he had, in or to the diamond ring in the complaint described, and hence cannot recover in this action. Your verdict must therefore be for the defendant.

"2. It appears from the letter of February 25, 1888, introduced in evidence by the defendant, that the plaintiff on that date gave his interest, if any, in the ring in controversy to his wife, Mrs. Church, to be held by her for the benefit of their infant son. The possession of the ring being rightfully in Mrs. Church, it is immaterial in this action what disposition Mrs. Church made of the same. The plaintiff has no interest, and hence cannot recover in this action."

The bill of exceptions shows that evidence was introduced on behalf of the plaintiff tending to prove the allegations of the complaint, and on behalf of the defendant directly contradictory of the evidence of the plaintiff, and tending to prove the allegations of the answer. The bill of exceptions further discloses the fact that at the time of the trial the Mrs. Church referred to was the wife of the plaintiff, but that she was not then living with him as his wife, nor had they lived together as husband and

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wife after February 25, 1888. On this date, the plaintiff wrote Mrs. Church a long letter in reference to their troubles, in which occurs the passage upon which the defendant's requests were evidently based. So much of this letter as is necessary to a proper understanding of the question is as follows:—

“BR. B., MOBILE BAY, PORTLAND,
February 25, 1888.

“*Maggie*,—Did you receive note from me dated the 23d of this month? If so, no doubt you understood its import. I went to meet you, and you were not there. I got my answer. Now, *Maggie*, I did not ask you to come to me through any mercenary motive, but because I love you; what you think to the contrary, your mind has been poisoned by numerous tongues, and you seem to believe them in preference to me. What their motives are or who they are, I do not know. Nevertheless, I have told you the truth in every instance; but as you say you do not believe, I can do no more. They have done me a great wrong, —a wrong which will cling to me through life, making it bitter; but the time may come when you can see that I have been traduced, and those who are the cause,—well, ‘their deeds will find them out.’ Now, *Maggie*, I wish that you would send by this boy that picture of myself when a child; also the picture which you have of a later date,—the former, as I wish to send it back to my mother; the latter, because it cannot be of any value to you. The diamond ring belonging to me which you wear, as it has only an intrinsic value to you, I give to our boy. Keep it for him until he shall have arrived at an age of understanding. At that time it may please him to think it was once his father's.”

Mrs. Church testified that the boy referred to in this letter was the only child of plaintiff and herself, and was about two years of age; that she sold the ring described

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in the complaint to the defendant in July last for about \$175, with some other jewelry, and that she delivered to the defendant possession of the property at the time of the sale. Mrs. Church also testified, in substance, that she was the absolute owner of the ring in controversy from March, 1884, until its sale by her to the defendant, in 1888.

1. The instructions asked on the part of appellant in effect took the case from the jury and directed them to find a verdict for the defendant. It is difficult to perceive on what legal theory such instruction could be based. Here was a case where a large amount of very conflicting evidence was before the jury. I cannot understand why it was not their province and duty to weigh and consider it. There was nothing to make the case exceptional, or to take it out of the ordinary rule. Counsel for appellant appears to base his claim to these instructions upon the supposed legal effect of the letter submitted in evidence on the part of the defendant. It is said, substantially, that it is the duty of the court to declare the legal effect of all written instruments admitted in evidence (2 Phillipps on Evidence, *632); that this letter is within that rule, and that the instructions requested simply declare the legal effect of the letter. But I think the letter is not a "written instrument" within that rule. It is not a contract, nor is it a will, nor did it fix and necessarily control the rights of the parties. It was nothing more than a statement in writing by the plaintiff declaring his wishes as to the disposition of a chattel which he claimed to own.

It is said in 2 Best on Evidence, section 475: "A letter is not, at least, in general, a written instrument; and therefore taking the maxim of the common law to be as stated by Abbott, C. J., a letter does not fall within its meaning." The letter was evidence, a fact to go to the jury

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on the question of title, to be weighed and considered by them with the other evidence in the case, but it was not necessarily conclusive. Besides, the instructions asked singled out one item of evidence,—ignoring the testimony of Mrs. Church that she was the owner of the ring herself at the very time the letter was written,—and thus required the jury to find their verdict on that item alone, disregarding all else. The defendant no doubt acted in good faith in purchasing the ring from Mrs. Church; but the effect of the verdict is, that she sold without authority, and his possession therefore was legally wrongful. In such case good faith is of no avail. *Caveat emptor* applies to such sales.

It follows from what has been said that the judgment of the court below must be affirmed.

[Filed March 27, 1889.]

STODDARD, RESPONDENT, v. NELSON, APPELLANT.

WRITTEN CONTRACT—EXTRINSIC EVIDENCE.—Extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms of a written contract. All antecedent or contemporaneous negotiations or agreements are merged in the writing.

APPEAL from Multnomah County.

J. R. Stoddard, per se.

Moreland & Masters, for Appellant.

STRAHAN, J.—This is an action brought to abate a nuisance, and to recover damages for maintaining the same.

The amended complaint is substantially as follows:

1. That defendant is the owner of lot 8 in block 118 of the city of Portland; that plaintiff, as trustee, leased

17	417
20	424
21*	456
26*	277
17	417
38	451
17	417
37	512

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the front fifty-one feet of said lot of defendant, for a term, for rental value, and placed buildings upon it. Defendant thereafter, during the term, and without plaintiff's consent, built a high board fence on the rear line of said leased property, which sensibly shut out light and air from plaintiff's stores, and rendered the same unsightly, unhealthy, and to a sensible degree less fit for occupation and business, and impaired the rental value thereof, and caused the same to be vacated, to plaintiff's damage \$622.

2. That said lease provided for a renewal, at a rental to be agreed upon; at the expiration of said lease, defendant promised orally to stay the damage being done to said premises by said fence, and to remove the same before July 1, 1888. The rental value was fixed, and thereupon the renewal lease was signed pursuant to said agreement; that defendant did remove said fence on or about said last-named date, but before he did so, he built and has ever since maintained another one similar, parallel to, and within two feet of said first fence, and extended the same up to the eaves of said building, which sensibly shut out light and air from both stories of said building, and rendered the same unsightly, unhealthy, and to a sensible degree less fit for occupation and business, and impaired the rental value thereof, and caused the same to be vacated, to plaintiff's damage in the sum of sixty dollars.

The defendant demurred to each count in the complaint, which being overruled, he filed his answer.

The defendant by his answer admits all of the allegations of the complaint except those relating to the location of the fence on the line, the amount of damage caused thereby, and the oral agreement to remove it.

Upon a trial before a jury, the plaintiff had a verdict and judgment for twenty-five dollars damages, from which judgment the defendant has appealed to this court, and

has assigned the following grounds of error in his notice of appeal: "1. The court erred in not sustaining the defendant's demurrer to the plaintiff's amended complaint, and to each count thereof; 2. The court erred as is set forth in the bill of exceptions; 3. The court erred as to the admission of parol evidence as to any contract or agreement to take down the fence complained of; 4. The court erred in allowing the witnesses to testify as to any oral agreement or undertaking in regard to said fence; 5. The court erred in its instruction to the jury, as is set out in the bill of exceptions; 6. The court erred in giving judgment for costs and disbursements; 7. The court erred in ordering a warrant to issue to abate the nuisance."

The plaintiff, upon the trial, gave evidence tending to prove that defendant owned lot 8 in block 118 in the city of Portland, and that on the fourteenth day of December, 1885, he leased to John Middleton the west fifty-one feet by fifty feet for the period of two years; that said lease was in renewal of a lease theretofore made of the same ground by the defendant to one Harris, who assigned the same to Quivey, who in turn assigned to Middleton; that at the time of the execution of said leased premises a two-story building, erected by Quivey, covered the whole of said ground, and that said building also belonged to Middleton; that said building was constructed in such a manner as to receive its light and air for the rear portion thereof chiefly through windows in the rear of the building; that the remainder of said lot 8 not leased to Middleton was in the possession of defendant, and had a dwelling-house on the rear part of the same, leaving a large open space between said dwelling-house and said building owned by Middleton, over which open space the Middleton building received, by means of its rear windows, light and air for that part of the building; that

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about August 19, 1886, said Middleton assigned said lease and building to the plaintiff, and that he held said leased premises by virtue of said lease for the residue of Middleton's term; that about September 1, 1887, the defendant, without plaintiff's consent, built on the line of the part of said lot occupied under the Middleton lease by plaintiff a high and tight board fence, right along close to the building occupied by plaintiff, which darkened the windows and cut off the free circulation of air, and materially damaged and depreciated the value and use of said building; that about the time of the expiration of the Middleton lease, the matter of the renewal for three years more provided for therein, and the amount of rent to be paid upon such renewal, came up for discussion between plaintiff and defendant.

The plaintiff, being on the stand as a witness in his own behalf, was proceeding to state conversations and an agreement between himself and defendant in relation to the fence which the defendant had erected on said line.

The defendant at this point objected to any oral testimony tending to prove any contract in relation to said fence, for the reasons it appeared that a new lease had been executed by the defendant and accepted by the plaintiff, and that all agreements and covenants relative to said fence and lease were merged in the written lease.

The plaintiff then stated that he offered to prove by parol evidence that he declined to take the renewal lease unless the obstruction of said light and air caused by said fence were removed, and that there was then and there an agreement on the part of the defendant to remove the same, and that such agreement was the inducement to the acceptance by the plaintiff of the renewal lease.

The defendant renewed his objections to said evidence because the same was incompetent.

The court overruled the objections, and allowed the

evidence offered to be submitted to the jury, to which the defendant excepted, and this exception presents the first question to which our attention will be directed.

1. The rule of law is too well settled to admit of controversy that extrinsic evidence is not admissible to either contradict, add to, subtract from, or vary the terms of a written contract. (1 Hill's Code, sec. 692; 1 Greenl. Ev., sec. 275; *Bast v. Bank*, 101 U. S. 93; *Wilson v. Dean*, 74 N. Y. 531; *Naumberg v. Young*, 43 Am. Rep. 380; *Warren Glass Works v. Keystone Coal Co.*, Md., June 24, 1886; *Hutton v. Maignes*, 68 Iowa, 650; *Williams v. Kent*, 67 Md. 351; *Looney v. Rankin*, 15 Or. 617; *Speckles v. Sax*, 1 E. D. Smith, 253; *Dutton v. Gernish*, 9 Cush. 89; *Smith v. Caro*, 9 Or. 278; *Thompson v. Libby*, 36 Minn. 287; *Parker v. Morrill*, 98 N. C. 232; *Miller v. Edgerton*, Kan., Dec. 10, 1887; *Walker v. Engler*, 30 Mo. 130; *Harris v. Morrison*, Minn., Nov. 2, 1888; *Freeman v. Freeman*, Mich., Jan. 5, 1888; *Jungerman v. Bovee*, 19 Cal. 354; *Steward's M. E. Church v. Town*, 49 Vt. 29.) These authorities might be greatly multiplied, but enough is cited to show with what uniformity and firmness the law has been applied.

The respondents cited a number of authorities from Pennsylvania, showing that the rule under consideration has not been always as rigidly applied in that state as it has elsewhere; and it is said in Cowen and Hill's Notes to Phillips on Evidence, p. *650, note 487, "that the Pennsylvania cases on the subject of oral evidence, in respect to written instruments, are not always safe guides when the inquiry is simply as to the rule *at law*."

In *Bat v. Bank*, *supra*, the supreme court of the United States says: "It is not always easy to determine when, in Pennsylvania, parol evidence is admissible to explain a written instrument, but in *Anspach v. Bast*, 52 U. S. 356, it is expressly declared that no case goes the length of ruling that such evidence is admitted to change the

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promise itself, without proof or even allegation of fraud or mistake." To the same effect is the case of *Hucker v. National Oil Refining Co.*, 73 U. S. 93, as well as many others that might be cited.

It is not possible, without doing violence to principles as old and as firmly fixed as the common law itself, to escape the force and effect of these authorities. It is true, their application in this particular case may work a hardship on the plaintiff, but he was familiar with the law, and could readily have protected himself by ingrafting the stipulation into the written lease.

On the argument here the respondent insisted that the agreement in relation to the removal of the fence was collateral, and might therefore exist in parol. But was it collateral? The respondent says it was a condition upon which the renewed lease was accepted. It related to the convenience and tenantable condition of the demised premises, and was probably essential to their enjoyment. How can it, then, be claimed that this part of the agreement was collateral?

There are no allegations of fraud on the part of the defendant, in respect to the execution of said lease, or the manner he has acted in relation to the demised premises, and no question on that subject can be considered in this case. Having reached a conclusion that is decisive of the case, it is unnecessary to consider or to determine any of the other questions that were argued on the appeal.

The judgment must therefore be reversed, and the cause remanded for a new trial.

NOTE. — A reargument was allowed in this case on the question, "Did the written agreement merge the antecedent parol agreement?" On May 3, 1888, the court announced that it adhered to its first opinion. — RER.

Points decided.

[Filed April 2, 1889.]

MARY E. MILLER, APPELLANT, v. C. S. MILLER ET AL., RESPONDENTS.

THE RULE THAT THE INTENTION OF THE PARTIES to a deed of conveyance must be ascertained from the terms of the instrument and the circumstances surrounding the transaction applies to the case of a deed executed by a husband to his wife prior to the adoption of the statute enabling husbands and wives to convey real property from one to the other, and hence it is incompetent for the husband, after executing to his wife an absolute deed in form to such property, to testify in direct terms what he intended by it.

A DEED FROM A HUSBAND TO HIS WIFE was a nullity at common law, upon the ground that it regarded them as but one person; but equity regarded them for many purposes as a duality, and enforced such deeds, when intended by the husband as a provision or settlement in favor of the wife, where the rights of creditors were not affected thereby, and the conveyance in other respects was fair and just. Nor was it necessary, in order to uphold such a deed, that it should be a formal deed of settlement; the presumption was, where the conveyance was by an ordinary deed, that it was intended as an advancement and provision for the wife.

THE LAW ATTACHES TO ABSOLUTE DEEDS AND TRANSFERS a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law or equity.

IT WAS NOT NECESSARY, in order to give the wife a separate use in the property, that the conveyance from the husband to her should contain words indicating such intention, for the law presumed that it was intended for her separate and exclusive use.

WHERE C. S. M. EXECUTED TO HIS WIFE, M. E. M., a deed of conveyance to certain real property, and the deed purported to be in consideration of the receipt of one dollar, and in compliance with a certain promise and agreement theretofore made, and contained an *habendum* clause to the effect that she was to *have and hold* the property to herself and her heirs and assigns forever: *held*, that he was precluded from claiming—without alleging fraud or mistake—that there was no consideration for the deed; *held further*, that the deed created in equity a trust in the premises in favor of the wife. But as the facts and circumstances showed that it was evidently intended as a provision for the wife and their children, which he was also expected to enjoy; and the evidence in the case strongly indicating that the wife had not remained faithful to her husband; that her affections for him had become alienated, resulting finally in a dissolution of the marriage ties between them: *held*, that equity ought not to aid her in the enforcement of the trust, where the court was not satisfied that it was created for a valuable consideration, except as to a certain class of

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debts incurred by the wife for the support of the family, and in making permanent improvements upon the premises which she had attempted to charge upon the property.

APPEAL from the Circuit Court for the county of Wasco.

W. Lair Hill and *F.^oP. Mays*, for Appellant.

Bennett & Wilson, for Respondents.

THAYER, C. J'.—The appellant and the respondent C. S. Miller were formerly husband and wife; they maintained that relation many years, and reared a family of children. In 1874 they lived in Idaho Territory, where they had been living as husband and wife for some time.

On the thirtieth day of June, 1874, said respondent executed to the appellant a deed, purporting to convey to the latter certain real property situated in said county of Wasco, Oregon, consisting of a farm and fruit orchard, and known as the Graham property, including also a certain toll-bridge across the Deschutes River.

The deed was in the ordinary form of a deed of bargain and sale. The language of its premises is as follows: "This indenture witnesseth: That I, Charles S. Miller, for the consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, and in compliance with a certain promise and agreement made on the twenty-fifth day of April, A. D. 1874, have bargained and sold, and by these presents do bargain, sell, and convey, unto Mary Elizabeth Miller, my wife, the following described premises," etc.

The *habendum* clause in the deed was in the usual form: "To have and to hold the said premises, with their appurtenances, unto the said M. E. Miller, and to her heirs and assigns forever."

It appears that after the execution of the instrument the said appellant and her children resided upon the

premises, and that the said respondent made them his home for the next six or seven years after it was executed, but he was engaged in mining enterprises, which occasioned his absence from there a great part of the time. It seems that the deed was not put upon record until the ninth day of May, 1877, at which date said respondent delivered it to the clerk of the county of Wasco to be recorded.

It further appears that said parties were divorced in April, 1885, and that afterwards, and on the twentieth day of February, 1886, in an action in the said circuit court, brought by the said respondent against the appellant, the respondent obtained a judgment for the possession of the said real property; that thereupon the appellant commenced an action in said circuit court against the respondent herein, to enjoin the respondent Miller from enforcing execution of said judgment, and to declare certain deeds executed by said respondent to the other respondents severally void, alleging in her complaint that prior to the time of the execution of the said deed of 1874, she and the said respondent Miller made an agreement with each other to the effect that said respondent should convey to her the property described in the said deed, and certain other property, in consideration that she would cancel and satisfy an indebtedment of four thousand five hundred dollars owed by him to her; that she would let him have the additional sum of three hundred dollars; and that she would provide a comfortable home and support for his mother during her life, if the mother should survive him; that in pursuance of and in compliance with the said promise and agreement the said respondent Miller executed to the appellant the said deed of June 30, 1874, and the appellant on her part canceled said indebtedment of four thousand five hundred dollars; that it was intended and understood by both parties at the time that said deed vested the title and all legal rights in said prop-

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erty, including the premises in controversy, absolutely in the appellant as her separate property; that under and by virtue of said conveyance, with the consent and by the direction of the said respondent, the appellant immediately thereafter took possession of the property, and assumed the exclusive control and management thereof, which possession she held without interruption until July 11, 1885; that appellant, after taking possession of the premises, paid said respondent, partly in cash and partly in property, the remaining eight hundred dollars, as she had agreed to do; that during the time she was in possession of the premises she was compelled to and did expend large sums of her own money in building, repairing, and keeping up the improvements thereon and appurtenances thereto, and in managing the same and preventing waste thereof, all of which was done with the knowledge and approval of said respondent; that subsequently to the execution of said conveyance the said respondent failed and neglected to provide for the support and maintenance of appellant and the five children of her and him, and she, having no means of support, contracted indebtedment to Z. F. Moody, for moneys and merchandise furnished by said Moody to her, with which to support herself and children, in the sum of three thousand dollars, most of which indebtedment was so contracted while said respondent was absent from his family, and that to secure payment of said indebtedment she executed to Moody a mortgage upon the premises on September 10, 1884, which mortgage was duly recorded and remains yet unpaid.

The appellant alleged also in her complaint that, in paying off, at the request of said respondent, certain debts contracted by him to divers persons, and certain obligations contracted by him in her name without her knowledge, and in replacing fences and the bridge on

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the premises, she became indebted to William Grant for moneys advanced by him to her in the sum of \$4,143.69, and being pressed by him for payment thereof, she confessed judgment for said sum in his favor on February 9, 1885, in said circuit court, which was duly docketed, and is a lien on the premises; that on July 11, 1885, she executed to Paul F. Mohr a deed conveying to him the premises; that Mohr held possession thereof until March 3, 1886, when he reconveyed them to her, since which time she had been in the exclusive possession thereof.

The respondents, after denying some of the said allegations absolutely, and others qualifiedly, set up as a further defense the following matter: "That the deed of conveyance from the said respondent to the appellant alleged in her complaint was intended to be and was a deed of trust, and was made, executed, and delivered to the appellant upon the understanding and agreement that she should faithfully hold the same, without placing any encumbrance thereon, in trust for the said respondent and his children, according to his direction; that appellant, in violation of said trust, and of her agreement in relation thereto, had executed and delivered mortgages upon said premises, and had attempted to sell the same, and had squandered the income therefrom, and that she now desired to have the legal title thereto vested in her, that she might sell the same and apply the proceeds thereof to her own use and benefit, in violation of the aforesaid trust."

The case was heard upon the said issues, and the depositions and proofs of the respective parties taken therein, and the circuit court thereupon decreed the dismissal of the complaint, from which decree the said appeal has been taken.

The main point of contention between the parties was

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in regard to the real object of the execution of the deed by the respondent C. S. Miller to the appellant.

The appellant's counsel does not claim that the deed passed the legal title from the grantor to the grantee, but he insists that the transaction was intended to be a sale of the premises by the former to the latter for a valuable consideration, and that a court of equity should enforce its consummation.

The respondents' counsel, on the other hand, denies that there was any consideration for the conveyance, and contends that the circumstances of the affair show that the said respondent did not intend to convey to the appellant any beneficial interest in the premises.

A mass of testimony was taken in the suit, but the part thereof which bears upon the said issue is so conflicting and unsatisfactory that it is difficult to determine what the real consideration of the deed was.

The deed recites as a consideration, as before mentioned, the payment of one dollar, and the compliance with a certain promise and agreement made on the twenty-fifth day of April, 1874. The acknowledgment of the receipt of one dollar is evidently a mere formality; but it is highly important to ascertain what the promise and agreement was, as that undoubtedly was the moving clause of the execution of the instrument. The appellant in her complaint alleged, in effect, that it was a promise to convey to her the premises, upon her agreement to cancel and satisfy the indebtedness owed to her by said respondent, to advance to him an additional sum, and to provide a home and support for his mother.

These allegations, whether true or not, were consistent with the recital.

The respondents' allegations in their answers were, that the deed was intended to be a deed of trust, and was delivered to appellant upon the understanding and agree-

ment that she would faithfully hold the same, without placing any encumbrances thereon, in trust for said respondent and his children, according to his direction.

It does not appear from the answer when this "understanding" was had, or the "agreement" was made, nor whether any understanding was had or agreement made at any time distinct from the time of the execution of the deed. And the testimony of the said respondent in his deposition was equally vague and uncertain.

He stated, in answer to an interrogatory as to what the said agreement was, as follows: "The agreement was that she was to keep it out of debt, and hold it subject to my direction and disposal." But he avoids both in his allegations and testimony, stating what *the certain promise and agreement* was made on the twenty-fifth day of April, 1874, which he, *in order to comply with*, on the thirtieth day of June, 1874, bargained and sold the premises to the appellant.

The recital in the deed implies that he executed it in order to fulfill an obligation he was under to the appellant. He certainly did not execute it in compliance with a promise and agreement made by her; it was evidently his own promise and agreement that he was endeavoring to comply with. In view of the said recital in the deed, the allegations in the answer and the testimony of C. S. Miller, the respondents' counsel must necessarily claim that the said promise and agreement, made on the twenty-fifth day of April, 1874, was to the effect that Miller would deed to his wife the premises in dispute, in consideration of her agreement that she would faithfully hold the same in trust for him and his children according to his direction, and not place any encumbrance thereon, and that the deed was subsequently executed in compliance with such promise and agreement. The main issue between the parties therefore is, whether the said promise and

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agreement is as claimed by the appellant, or is as claimed by the respondents.

The respondents' counsel contended with great earnestness that the weight of evidence did not show that the deed was executed to the appellant for a money consideration, and he was so far successful in his efforts in that particular that I should be exceedingly loth to hold that any consideration was given therefor, as claimed by the appellant; but on the other hand, he was not successful in showing that the deed was executed in accordance with the agreement, and for the purposes claimed by the respondents.

It appears to me that the court will not be obliged to go outside of the claim of either party regarding the facts of the case, in order to ascertain the purpose and intent of the deed. It does not seem possible that C. S. Miller executed it as a mere matter of form, or, as he testified, that it was not intended to transfer the beneficial interest in the property, and that the real ownership of it was to remain in him as before.

In view of the character and terms of the instrument, and of the facts and circumstances surrounding the transaction, he stultifies himself by such a pretense.

He had said, under his hand and seal, that he bargained, sold, and conveyed the premises to the appellant, to have and to hold unto herself and to her heirs and assigns forever; had acknowledged before an officer of the law that he executed the instrument for the uses and purposes therein mentioned; and had delivered it to and it had been accepted by the appellant. How can the said respondent, therefore, be heard to say that the deed was intended to convey a "fictitious title," "a title of convenience that he could direct"?

The intentions of the parties to such a transaction must be gathered from their acts and deeds, and not

from what one of them may afterwards say it was. At the time the deed was executed, the parties were living at Silver City, Idaho, which was in a mining district. Miller was operating in mines, engaged, as he himself says, in a risky business. His family, consisting of his wife and five children, were dependent upon him for support. He was evidently an enthusiast upon the subject of mines, —expected to acquire a fortune therefrom, though conscious that failure was possible. Why should he not, therefore, under such circumstances, settle the property in controversy upon his wife, and thereby secure a permanent home for his family and a haven of refuge for himself, in event of shipwreck upon the treacherous sea of mining schemes and speculations?

The course which the parties pursued after the execution of the deed clearly evinces that the object and purpose were to invest the appellant with ownership of the property. The family moved out to the premises soon after, and Mrs. Miller took the whole charge of them. She managed the farm, bought and sold stock, cultivated fruit, and kept the toll-bridge, while her husband divided the main part of his time between Idaho, San Francisco, and New York City. He admits that she conducted the business appertaining to the premises, but claims that she was acting as his agent in the affair. Witnesses testified that he stated on several occasions that the property belonged to her. He told George H. Durham, Esq., in 1877, that the Deschutes bridge property belonged to his wife, and he told Dow, a nurseryman residing at The Dalles, in a conversation had with him in 1878, that she was the sole owner of the property. His own testimony, taken altogether and fairly construed, shows that he considered that he had conveyed the property to her.

In his deposition he was asked the following questions, and gave the following answers thereto:—

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"Q. Then the deed was not intended to create a trust, but was merely intended to place the property out of reach, as you supposed, of any possible creditors you might have afterwards?" "A. It was intended as a deed of trust. When I made it, I thought it was a good deed, and Mrs. Miller was to hold it in trust, subject to my direction."

"Q. Then it was intended by you to convey something more than the nominal title?" "A. I did not so consider it as between her and myself. I had confidence in her as my trustee at that time."

"Q. Why did not the deed recite that it was intended to create a trust?" "A. I wrote this deed myself; did not advise with an attorney or anybody about it; *but I trusted in my wife*, and did not consider the legal points about it."

If Miller considered the deed a deed of trust, and had confidence in his wife as his trustee, he must have supposed that he was conveying some interest or estate in the premises to her; otherwise, there would be nothing upon which the trust could operate, nor any reason for reposing confidence in her. But a trust cannot be proven in that way, conceding that one could be shown in such a case, notwithstanding the absolute terms of the deed. It must be shown by proofs of the facts and circumstances occurring at the time of the transaction. In order to prove such a trust as claimed by Miller,—if susceptible of proof by parol testimony,—he should have shown what was said and done by the parties to the deed at the time of its execution. His testimony upon that point is in the nature of inference more than of fact.

The respondents' counsel seemed to rely as a defense to the suit upon the fact that the deed did not pass the legal title, and that the conveyance was not such a one as equity will enforce. He claims that it is not enough for the appellant to show that the deed was actually executed, but

that she must go further and show that there was some equitable consideration therefor, and that the beneficial interest was intended to be conveyed thereby.

Deeds between husband and wife were regarded at common law as nullities, upon the ground that the parties were but one person. Equity, however, considered them for many purposes as a duality, and sustained deeds and bond executed by one to the other which were not valid in law. But courts of equity, in the establishment of the doctrine, as in other cases of seeming encroachment upon the rules of the common law, have advanced by slow and cautious steps, though I cannot see why they should not have held, since estates to uses were recognized by law, that a deed to real property, made by a husband directly to his wife, was as effectual to convey to her the use of the property as if made to a third person for her use. Had Miller executed the deed in question to Jones, in trust and for the use of Mrs. Miller, no question would arise as to the rights and interest of the latter in the property as between the parties, and in my opinion the courts more recently are inclined to take that view of the law. The only difference I can discover between the two cases is, that in the one, Jones would be the trustee of the legal title for Mrs. Miller, and in the other, Miller himself would be the trustee thereof for her.

In *Jones v. Clifton*, 101 U. S. 225, the court held that the intervention of trustees, in order that the property conveyed by a husband to his wife might be held as her separate estate, beyond his control or interference, though formerly held to be indispensable, was no longer required. Justice Field, in delivering the opinion of the court in that case, at page 227 uses the following language:—

“The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing

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existing claims of creditors, is indisputable. Its exercise is upheld by the courts as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage."

And after referring to the case of *Sexton v. Wheaton*, 8 Wheat. 229, the learned judge at page 228 proceeds: "That case does not differ in principle from the one before us. The husband in this as in that one was free from debt when he made the deeds, which were voluntary settlements upon his wife. It cannot make any substantial difference that in the case cited the money of the husband was expended in the purchase of the property, and the conveyance was taken in the name of the wife; and that in the present case the property was owned at the time by the husband, and was transferred directly by him to her. The transaction in its essential features would have been the same as now if the husband had sold his lands and invested the proceeds in other property, and taken a conveyance in her name. The circuitry of the proceedings would not have altered its character, nor affected its validity. In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them, as in the case of a wife or children or parents, the only question that can properly be asked is, Does such a disposition of the property deprive others of any existing claim to it? If it does not, no one can complain if the transfer be made matter of public record, and not be designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustees,—whether it be by direct conveyance from the husband, or through the intervention of others."

I may not understand the position of the respondents' counsel in claiming that the appellant must show an equitable consideration for the deed, and that the beneficial interest in the premises was intended to be conveyed thereby; but if he claims that she must show that her husband owed her some special duty, making it incumbent on him to deed her the property, and show *dehors* the deed such intention, I will be unable to agree with him. Nor do I understand the case resolves itself down to the simple question whether or not the appellant has shown satisfactorily that the transaction between her and Miller was an actual purchase of the property for five thousand three hundred dollars, as claimed by her.

The fact that the appellant was the wife of Miller at the time he executed the deed to her, and the mother of his children, whom she had the care and control of, was a sufficient consideration for the deed, if intended as a provision for her. (*Moore v. Page*, 111 U. S. 117, and the authorities there cited.) And it is not necessary that the deed should be a formal deed of settlement.

Where the conveyance is by an ordinary deed, and not by a formal deed of settlement, the presumption is, that it was made by way of advancement and provision for the wife. (*Wilder v. Brooks*, 10 Minn. 55; citing *Whitten v. Whitten*, 3 Cush. 197.)

In *Deming v. Williams*, 26 Conn. 229, the court, Ellsworth, J., in considering the validity of a gift of shares of stock by a husband to a wife, says: "As to the fourteen shares purchased by Mr. Cowles, he never took a title to them himself, but had them at once transferred by the vendor into the name of his wife. Now, had such transfers been made by a parent into the name of a child, the child would acquire the interest as an advancement, such intent being inferred by law from the relationship of the parties. The same is true in case of the wife, where the

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husband purchases land and has the deed made directly to her, there being in the case no creditors and no fraud upon any other party. The law attaches to absolute deeds, and transfers a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law or equity. Such are all the gifts or deeds by husbands to wives of real or personal estate found in the books, from the case of *Slanning v. Style* (decided in 1734, and found in 3 P. Wms. 334) to the present time, and they are exceedingly numerous. They sustain the principle that, so far as the form and substance of the gift or alienation are important, that which would be good if made to a third person is good in a court of equity if made by the husband to his wife."

In *Simms v. Rickets*, 35 Ind. 181, it was held that prior to the recent legislation in that state authorizing married women to hold real estate to their separate use, when a conveyance was made by a stranger to a married woman, or to a trustee for her, it was necessary, in order to give her a separate use in the property, that such conveyance should contain words clearly indicating such intention, but that such words were unnecessary in a conveyance from a husband to his wife, for the law presumed that it was intended for her separate and exclusive use. The court also further held in that case that conveyances from a husband to his wife are not sustained in equity if there is some feature in them impeaching their fairness, and certainly as that they are not in the nature of a provision for the wife, nor where they interfere with the rights of creditors, or when the property given or granted is not distinctly separated from the mass of the husband's property.

In the above case, the deed was executed in the state of Pennsylvania to lands situated in Indiana, and purported to be in consideration of the sum of one dollar. In *Dale*

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v. *Lincoln*, 62 Ill. 22, a similar case, the deed purported to be in consideration of one dollar; and in *Crooks v. Crooks*, 34 Ohio St. 610, also a similar case, the deed purported to be in consideration of five dollars; yet in each of these cases it was held that the deed was sustainable in equity, on the ground that it was intended as a suitable provision for the wife, although such fact did not appear in the deed itself. In *Simms v. Rickets*, *supra*, the court, at page 185, indulges in some very wholesome remarks when it says that "it is important that some fixed and definite rules should be established, by which we are to be governed in the decision of such cases, as it is not safe to leave such questions to the mere discretion of the court, for in such case the peculiar views or prejudices of the judge would determine the rights of parties."

The best rule upon the subject that can be adopted, where the contention is entirely between the husband and the wife, would, in my judgment, be to hold that the parties were bound by the terms of the deed; and where its terms are absolute, that it conveyed "the entire interest or property" to the grantee, "so far as the alienation is permitted by the principles of law or equity," which, prior to the late statutes authorizing husband and wife to deed real property directly to each other, would be a right in equity to the use of the property. This, it seems to me, is the only rational rule on the subject. Where, however, the rights of creditors or other parties are involved, the rule is different.

Then it is necessary to show that the deed was intended as a settlement, and that the property conveyed or set apart to the wife was no more than a reasonable provision for her support. To allow the grantor, in such a case, in order to render the deed ineffectual, to come in and swear that he did not mean what he had said under his hand and seal, or to claim that the deed intended

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something different from what its terms implied, is a violation of the established rules of evidence. How could the appellant in this case show by any more cogent proof that the beneficial interest in the premises was intended to be conveyed to her than by the deed itself? She was not certainly required to strengthen it by testimony that Miller made oral declarations at the time the deed was executed to the effect that she was to have such interest, as she had already his solemn acknowledgment to an instrument signed and sealed by him, "granting the premises with their appurtenances unto her and her heirs and assigns forever." Nor can Miller claim that there was no consideration for his execution of the instrument. His acknowledgment of the nominal consideration, and that he executed it in compliance with a certain promise and agreement theretofore made, preclude him from making such claim without alleging fraud or mistake. Whether the consideration was the thousand dollars earned by Mrs. Miller in keeping boarders in the Flint mining district, from June, 1870 to 1871; the thousand dollars she claimed he realized upon the sale of the mining stock which had been given to her; the eight hundred dollars for the bay team and outfit bought by her in 1872, with money she had before their marriage; the five hundred dollars she claimed he realized in raffling off some of her personal effects; the twelve-hundred-dollar team and outfit taken by her to Idaho in August, 1874, and turned over to him, which she claims to have bought with her own money; and eight hundred dollars or more she claims to have afterwards advanced to him,—I do not undertake to say; but that there was either a valuable or a good meritorious consideration for his executing the instrument, which created in equity a trust in the premises in favor of the appellant. Whether, however, it was such a trust as a

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court of equity ought, in view of all the facts in the case, to enforce, is a very difficult question to decide. The deed evidently was intended as a provision for the wife and children, and it was expected, no doubt, that the husband would also be allowed to enjoy the benefit of the property. The letter written by the wife to the husband, on the tenth day of March, 1879, wherein she says, with much warmth and earnestness: "I am doing my best to put the place in good order, and am willing and wish to turn it over to you when you come home. I never, never,—so help me God!—had a thought of trying to get this property from you, in order to be independent of you, nor for any purpose, save having a home for you, me, and the children, in case of business disaster or failure,"—expresses, in my opinion, the real object and purpose of conveyance. In her deposition she was asked this question: "Where did you live from the time you left Flint district, in 1871, until the spring of 1874?" To which she gave the following answer: "I had no home,—but lived in Wasco County, Oregon, and Owyhee County, Idaho Territory, and between the points, traveling." This answer reveals the secret to the execution of the deed. She was weary of a nomadic life, and while her husband was pursuing a kind of *ignis-fatuus*, as he seems to have been, she could never expect to have a home; hence the property in question was settled upon her. And if she had remained a faithful wife, a court of equity would not have permitted her to be disturbed in the enjoyment of it. The testimony, however, shows circumstances of an unfavorable character against her. Her affections for her husband became alienated, and the ties of marriage between them were finally dissolved.

Under such circumstances, it seems to me equity ought not to aid her in the enforcement of the trust, unless the court were satisfied that it was created for a valuable consideration.

Opinion of the Court—Thayer, C. J.

But there is another feature in the case which should be considered. Long before the parties separated, the appellant created indebtedness which she attempted to charge upon the property. This indebtedness is alleged to have been incurred in supporting the family, and in keeping the premises in repair; it is principally, if not entirely, due to Z. F. Moody and William Grant. Miller denies any knowledge concerning it; but he knew that she was supporting the family, was keeping up the premises, and was liable to become indebted therefor. He knew that she had contracted debts in several instances; he signed her name himself to a promissory note for a thousand dollars. He allowed her to represent the premises as the owner thereof; and it was shown that he said on several occasions that she did own them.

In view of these facts, she ought to be indemnified against liability on account of such debts, where they have been created for the purposes of supporting the family, or for making permanent improvements upon the premises, and the parties to whom they were due be secured in their payment. The appellant had such an interest in the property as would enable her to create a lien thereon; but the lien will be unavailing unless the trust is enforced, at least *pro tanto*. It will therefore be likely to operate unjustly to the appellant, and to her creditors who have parted with their merchandise and money upon the faith of her being the absolute owner of the property, if Miller is now allowed to fully assert the legal title thereto which remains in him. Under the circumstances, I think the appellant, as between Miller and those claiming under him since the execution of the deed to her, and her creditors to whom such indebtedness is due, should be deemed such an owner of the property as will subject it to the payment of debts of the character referred to, according to their priority of record; but

Points decided.

before said property is applied to the payment of any debts, the parties claiming them should be required to show by a preponderance of evidence that they were created for the purpose of supporting Miller's family, or making permanent improvements upon the premises in question. The facts as to whether the debts claimed, or any part thereof, were created for the purposes mentioned, can be ascertained when an attempt is made to enforce them; nor in case of a mortgage by a suit to cancel it; and in case of a judgment, by a motion to restrict the lien thereof to the proper amount in accordance with the rule here laid down.

Courts have a control over their judgments, and authority to adjust the rights of parties to them upon motion.

A decree should be entered herein in accordance with the principles of this opinion. Neither party will be entitled to recover costs; and each will be required to pay one half of the clerk's fees of the clerk of this court herein.

LORD, J., did not take part in the decision of this case, on account of sickness at the time of its hearing.

[Filed April 9, 1889.]

ASHLEY, RESPONDENT, v. WILLIAMS, ADMINISTRATOR
OF MILLER, APPELLANT.

PARTNERSHIP ACCOUNTING — BURDEN OF PROOF. — In a suit for a partnership accounting, where there are issues as to the existence of the partnership and the state of its affairs and business, or the state of the accounts between the partners, the burden of proof is on the plaintiff; and if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily fails to that extent.

PARTNERSHIP ACCOUNTING — FAILURE OF PROOF. — In such case, if necessary to close up the business, the court will determine that the accounts are closed, and that neither party shall recover anything against the other on

Opinion of the Court — Strahan, J.

account thereof, and that the property of the firm be sold, and after paying the costs, the proceeds be divided according to the interests of the members of such firm.

APPEAL from Multnomah County.

Williams & Williams, for Appellant.

Watson, Hume, & Watson, for Respondent.

STRAHAN, J. — This is a suit to dissolve a partnership, and for an accounting. The plaintiff had a decree in the court below, from which the defendant has appealed. Pending the appeal the defendant died, and his administrator was substituted. The existence of the partnership is denied, and that question presents the principal contention. A great deal of evidence was submitted on each side, which we have carefully considered; but it is impossible to determine from this evidence, so as to leave the mind satisfied with the result, whether a partnership existed between these parties or not. But inasmuch as the referee and the court below both found that there was a partnership, we have concluded not to change it. The existence of the partnership being established, it becomes necessary to inquire what relief shall be awarded. An accounting of some kind is always necessary upon a dissolution of a partnership, otherwise its affairs remain unsettled; but the court has no means of reaching a conclusion as to the true state of its affairs and business except from the evidence offered. And where there are issues as to the existence of the partnership, and the condition of its accounts and business, the burden of proof is on the plaintiff, and if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily fails. (*Maupin v. Daniel*, 3 Tenn. Ch. 223; *Nims v. Nims*, 1 South. L. Rev. 527; *Marvin v. Hampton*, 18 Fla. 131.)

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In this case the only evidence submitted by the plaintiff on this point are the books kept by himself. They consist of an order-book and ledger. The first is a book in which orders for advertising, the business in which the firm was engaged, are noted, giving the length of time the advertisement is to be continued, and the rate per month to be paid for the service. The ledger is very unsatisfactory as a basis for an accounting, it is accompanied by no day-book or blotter,—and it is not perceived how it is possible, from an inspection of the ledger alone, for the court to declare the true state of the accounts between the parties. Turning to Miller's accounts in the ledger, he stands charged with \$980.52 overdrawn by him, and the plaintiff claims that one half of this sum is due him on this accounting at all events; but a reference to the evidence as well as the ledger will show that the plaintiff withdrew from the business \$1,364.75, which he applied in payment of his board, \$296 for room-rent, and \$1,832.47 for other expenditures outside of the firm's business. None of these items are charged to the plaintiff, and the evidence shows many smaller ones which he also failed to charge to himself. Such a method of book-keeping is too unreliable to be the basis of an accounting at the suit of the party keeping the books. But it is useless to enter into an examination of the items. The sums drawn out by the plaintiff and not charged to himself are enough to cancel the charge against the defendant several times.

Owing to the impossibility of reaching a satisfactory conclusion as to the true state of the accounts between these parties, we have determined to direct that they be adjudged settled and closed, and that neither take or recover anything as against the other; that the lease of the use of the Multnomah Street Railway Company's cars for advertising purposes, together with the good-will of the

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business, and all other property and effects of the partnership, be sold, and the costs of this suit be first paid from the proceeds, next the firm's debts, if any, and the residue be equally divided between the parties.

[Filed April 9, 1889.]

SMITH, RESPONDENT, v. SMITH, APPELLANT.

REPLEVIN—VERDICT.—In an action of replevin, when the issues are the ownership, right to the possession and value of the property, and the wrongful taking by the defendant, a verdict which simply finds for the plaintiff in the sum of \$512 will not authorize a judgment in his favor.

APPEAL from Polk County.

N. L. Butler, for Respondent.

J. J. Daly, for Appellant.

STRAHAN, J.—This is an action of replevin to recover seven hundred and sixty-four and thirteen sixtieths bushels of wheat of the value of \$611.40, which plaintiff alleges that he owns, and that he is entitled to the possession of the same, and that it is wrongfully detained by the defendant. The prayer is, that plaintiff recover said wheat, or \$611.40, the value, in case delivery cannot be had, and \$100 damages for such taking and detention, with costs and disbursements. The answer denies the material allegations of the complaint, and then alleges in substance that defendant, at the time of said alleged taking, was the sheriff of Polk County, and that he had in his hands as such sheriff an execution issued out of the circuit court of Polk County, Oregon, against the property of one J. O. Smith, and that he seized and took said wheat under and by virtue of said execution as the property of

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said J. O. Smith, and that said J. O. owned said wheat at the time of such levy and seizure, and that he sold the same agreeably to the command of said writ. The reply admits all of the new matter contained in the answer, except the allegation that at the time of its seizure J. O. Smith owned the wheat in controversy. Upon these issues, the cause was tried before a jury, and the following verdict rendered:—

“We, the jury in the above-entitled action, find for the plaintiff in the sum of \$512.

“GEORGE TILLOTSON, Foreman.”

Upon this verdict, a judgment was rendered for the plaintiff for the sum of \$512, together with costs and disbursements taxed at \$147.75. From this judgment the defendant has appealed, assigning numerous grounds of error in his notice, all presenting the question of the insufficiency of the verdict to authorize the judgment.

1. *Jones v. Snider*, 8 Or. 127, is decisive of this case. That case settled the construction of our statute (Hill's Code, sec. 214), and has since been generally followed. Boise, J., delivering the opinion of the court in that case, said: “This verdict does not find on the issues as to the ownership of the property, or assess its value, but finds on the issue as to damages. The statute directs that the verdict shall be special and find on all these issues, and where the statute directs that the jury shall find a special verdict, and on certain named issues, the rendering by the jury of a general verdict for damages will not raise the presumption that the jury have found on the issues not specially named in the verdict. . . . A verdict to be valid must find on all the issues in the case, so that the controversy shall be finally determined.”

Phipps v. Taylor, 15 Or. 484, is another case where the same principle was applied. In that case it was said: “But this verdict is insufficient for another reason. By

Opinion of the Court—Strahan, J.

the complaint the plaintiff claimed to be the owner of the lumber in controversy, as well as to be entitled to its possession. The verdict is silent as to the ownership of the property, and that issue remains undetermined. In such case no judgment can be rendered for the plaintiff."

Unless these authorities are to be overruled, and the numerous cases upon which they depend entirely disregarded, and new interpretation placed upon the statute, it must be manifest that this judgment cannot stand. Counsel for respondent cited *Prescott v. Hulner*, 13 Or. 200, and claimed that its doctrines applied to this case would sustain the judgment. In applying that case, the real facts before the court must not be overlooked. It was an action of replevin, where the property in controversy had been delivered to the prevailing party under the writ. In such case the court held that a general verdict in his favor, without an assessment of value, would be sufficient. The reason of this doctrine is clear enough.

It is stated in *Phipps v. Taylor*, *supra*, as follows: "By the express provisions of the code (section 214), the plaintiff is only entitled to the alternative judgment if the property has not been delivered to him. If, during the progress of the action, it had been delivered to him, and the finding is in his favor as to the title to the property, when that is in issue, and the rights to the possession, the judgment is, that he recover the particular property, and, in a proper case, his costs. The property being then in his possession, and his right and title thereto conclusively settled by the judgment, there is no occasion or authority for an alternative judgment."

Counsel for respondent also claimed that inasmuch as the answer set up that the defendant had sold the property as sheriff, and the reply admitted it, it was thereby rendered impossible for the property to be returned, and that thereafter the plaintiff could proceed

Points decided.

only to recover the value of the property in controversy. If it be true that the property could not be returned as claimed by the plaintiff, then a case is made falling exactly within the statute providing for an alternative judgment. In such case the plaintiff recovers the property, or its value in case delivery cannot be had. To give full effect to the plaintiff's reasoning would practically repeal that portion of the statute providing for an alternative judgment. In every case when, during the trial, it appeared that for any cause a delivery of the property could not be had, the plaintiff would only take judgment for its value. This is not the rule prescribed by this statute, nor is it supported by any authority.

The views expressed lead to a reversal of the judgment, and a new trial in the court below.

[Filed April 11, 1889.]

GEORGE FORSTER, RESPONDENT, v. SAMUEL ORR,
APPELLANT.

17	447
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21*	440
29*	549

17	447
29	296

MALICIOUS PROSECUTION — COMPLAINT FOR — MUST SHOW TERMINATION OF PROSECUTION. — An action for malicious prosecution, where the court in which the prosecution occurred had jurisdiction of the subject-matter and of the person, cannot be maintained unless the prosecution has been terminated by the acquittal of the plaintiff in the action. The principle which requires the prosecution to have been terminated favorably to the plaintiff before he can maintain an action therefor is, that while the prosecution is pending undetermined, or when it has been determined adversely to the plaintiff in the action, the want of probable cause therefor cannot be shown in a collateral suit. The proceedings in the prosecution are evidence of their own rectitude until set aside in the due course thereof.

MALICIOUS PROSECUTION AND FALSE IMPRISONMENT DISTINGUISHED. — The same principle which is applicable to actions for malicious prosecution applies also to actions for malicious arrest issued in a civil action; hence where F. commenced an action against O. for having falsely and maliciously, and without any reasonable or probable cause therefor, procured a writ of arrest to be issued in an action brought by O. against F., whereby

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the latter was arrested and imprisoned, and the proceedings were regular on their face: *held*, that the failure of the complaint to show that the writ of arrest had been vacated or set aside by the court in the action in which it was issued was a fatal defect, and that the complaint was insufficient to sustain a recovery had thereon. *Held further*, that an allegation in the answer, to the effect that the plaintiff, after being arrested upon the writ of arrest, paid the defendant's demand on account of which he was arrested, and the disbursements of the proceedings against him did not aid the complaint in respect to such defect, but on the contrary, showed that the arrest was acquiesced in by the plaintiff. And the plaintiff not having denied in his reply the said allegation in the answer, *held*, that under the pleadings he had no cause of action.

APPEAL from a judgment of the Circuit Court for the county of Polk.

N. L. Butler and *Warren Truitt*, for Respondent.

J. J. Daly, for Appellant.

THAYER, C. J.—The respondents commenced an action in the said circuit court against the appellant for a malicious arrest. He alleged in his complaint, in substance, that on the second day of October, 1888, in a civil action begun by appellant against respondent in said circuit court, appellant, in order to procure the arrest and imprisonment of respondent, falsely and maliciously, and without any reasonable or probable cause therefor, duly made and filed his affidavit, duly verified by him, together with the undertaking required by law, in which affidavit he falsely and fraudulently, and without probable cause, alleged and charged that he believed the respondent had disposed of all his property with intent to defraud him, appellant; that said appellant, on or about said second day of October, 1888, willfully and without probable or any cause procured and caused a writ of arrest to be issued for the arrest of respondent, and thereby caused him to be arrested in said county of Polk by the sheriff of said county, and to be kept and detained a prisoner by the said

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sheriff for the time of more than hours, etc., setting out the circumstances of the injury resulting therefrom, and alleging damages in the sum of two thousand dollars. The appellant filed an answer to the said complaint, in which he denied all the material allegations therein contained; and set forth as a further defense, among other things, the following: that on the second day of October, 1888, the appellant commenced an action in said circuit court against the respondent for the sum of one thousand dollars, then due from the respondent to the appellant for rent of certain premises, and thereupon filed his affidavit therein for a writ of arrest against the respondent, and procured his arrest in said action; that respondent, after being arrested, and after consultation with counsel in regard to the matter, paid the appellant's demand against him on account of which he was arrested, and the disbursements of the proceedings against him accrued in said cause and upon said arrest, and asked that he be released from custody, and that all further proceedings against him be discontinued. Whereupon, by order of the attorney for the appellant, the respondent was released from custody, and said action against him and all further proceedings therein were discontinued. The respondent filed a reply to the new matter contained in the answer, denying the same excepting the matter the substance of which is above set out. The cause was tried by jury, who returned a verdict for the respondent for \$490, and upon which the judgment appealed from was entered. A bill of exceptions sent here with the transcript contains the instructions of the court to the jury, which are mentioned in the opinion.

The appellant's counsel herein contends that the complaint in the action does not state facts sufficient to constitute a cause of action; that it does not contain an allegation that the proceedings under which the arrest

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was made had been terminated in favor of the respondent, and that the court erred in giving certain instructions to the jury, set out in the bill of exceptions herein. The rule that the complaint in such an action must show that the prosecution complained of had been terminated by the acquittal of the plaintiff has always prevailed. That it is a necessary rule, every one, by a moment's reflection, will fully appreciate. Proceedings in courts which have jurisdiction of the person and the subject-matter must be shielded from collateral attacks, or else they would have no binding force. Hence, when such a proceeding has been regularly taken against a party and sustained by the court in which it is had, it is conclusively presumed, when collaterally assailed, to have been regular and valid, however erroneous it may be in fact. This is a fundamental principle of law which is highly essential to the stability of rights acquired under judicial adjudications. If the rule was otherwise, the judgment of courts would have no efficacy, as they would be subject to impeachment whenever an attempt was made to enforce them, and would leave disputes between parties forever unsettled. It will be seen, therefore, that the rule was not established by arbitrary dictation, but is a part of a sound and wholesome policy. The reference here made to actions for malicious prosecution should be understood as applying only to those actions where the prosecution was regular in form, and the court had jurisdiction therein. In a case where the proceedings in a prosecution are so irregular and defective that the court does not acquire jurisdiction, and the plaintiff is imprisoned under them, an action for malicious prosecution might lie without showing an acquittal of the plaintiff; but in such case the action would more properly be an action for false imprisonment. The latter action is trespass, while the former one is case. Arresting a party

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upon a void process is a direct injury, and the plaintiff may count upon assault and false imprisonment, and may recover damages therefor without alleging that the proceeding was terminated. But not so where the arrest is made under a proceeding which is only voidable; there the injury is not direct: it is merely consequential. It consists in making a false and malicious charge against the plaintiff without any reasonable or probable cause therefor, and whereby he was arrested and imprisoned. The proceeding can only be avoided by a direct attack, and until set aside, affords complete protection to all persons connected with it. Its validity cannot be questioned in a collateral suit. It was claimed by the respondent's counsel upon the argument that there was a distinction between a malicious arrest in a civil action and a malicious prosecution; but I am unable to discover any principle that will admit of any distinction which would benefit the respondent on this appeal. A writ of arrest regularly sued out, although procured upon a false affidavit, and maliciously, and without any reasonable or probable cause, must be deemed valid in a collateral action, unless set aside by the court in the original action. A writ of arrest, and proceedings connected therewith, if good upon their face, however unwarranted in fact, stand upon the same footing as an erroneous judgment. The writ is liable to be set aside upon motion, by proof that the affidavit upon which it was issued is false, and the judgment to be reversed upon appeal; but until so set aside or reversed, neither can be assailed collaterally. The rule laid down in *Searl v. McCracken*, 16 How. Pr. 262, by Mr. Justice Clerke, in a special-term decision, regarding the sufficiency of a complaint in such a case, is, it seems to me, the correct one.

The learned justice there says: "The complaint does not state that the order of arrest, which it alleges the

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defendant maliciously and falsely obtained against the plaintiff in another action, had been vacated, or that judgment had been rendered for the defendant therein. If the order was a nullity *ab initio*, and could afford no justification, these allegations would be unnecessary. But the order set forth in this complaint is clearly not void. If at all defective, and issued on a false affidavit, it is only voidable, and this must be determined by competent authority, before an action can be sustained against the persons who procured it."

In *Ferguson v. Tobey*, 1 Wash. 275, the same doctrine was adhered to; and there is no doubt in my mind but that it is sound. The respondent's counsel have suggested that the appellant's answer to the complaint in the action discloses the fact that the proceedings upon the writ of arrest were terminated before the action was commenced, and that such disclosure cures the defect in the complaint in that particular. The part of the answer referred to by said counsel is the portion set out in the statement herein, to the effect that the respondent, after being arrested, paid the appellant's demand against him on account of which he was arrested, and the disbursements of the proceedings against him accrued in said cause and upon said arrest. That fact does not certainly aid the complaint in respect to the said defect. It not only shows that the writ of arrest was not set aside, but that it was acquiesced in by the respondent; and under the view herein taken, it is conclusive evidence of its own rectitude. The attack upon its validity is made in a collateral action, and I do not see how it can possibly be sustained without overturning a highly important fundamental principle of law. Nor do I see how the respondent, under the facts shown by the pleadings, can be entitled to a judgment in the action. In view of this conclusion,

Points decided.

it is unnecessary to consider any of the other questions which have been presented in the case.

The judgment appealed from must be reversed, the cause remanded to the said circuit court, with directions to dismiss the complaint.

[Filed April 15, 1889.]

GRANT COUNTY, APPELLANT AND RESPONDENT, v.
LAKE COUNTY, APPELLANT AND RESPONDENT.

COUNTY — ACTION AGAINST. — An action at law cannot be maintained against a county unless authorized by statute.

Id. — Section 2239 Code of Miscellaneous Laws of Oregon, which provides that each county shall continue to be a body politic and corporate for certain purposes, authorizes an action to be maintained by or against a county for any cause affecting its rights or duties as such corporate body.

Id. — For the purposes for which a county is made a body corporate and politic, it is a person, and is capable of suing and being sued in regard to matters pertaining to those purposes, the same as an individual.

Id. — The creation of a body corporate for any purpose impliedly confers upon it the incidental powers belonging to a corporation; which includes the power to sue and be sued so far as necessary to maintain its corporate rights and enforce its corporate duties.

CONSTITUTIONAL LAW — COUNTY — INDEBTEDNESS OF — WHEN VALID — COUNTY LIABILITY OF UNDER LAW IMPOSING SAME. — Where the legislative assembly of the state passed an act which provided that certain territory should be taken from the county of G. and annexed to the county of L., and that the treasurer of the county of L. should pay to the treasurer of the county of G. such portion of the indebtedness of the latter county as the taxable property of the territory taken bore to the whole amount of taxable property of said county of G., not to exceed five thousand dollars, as said taxable property appeared by the assessor's roll of the year 1884, *held*, notwithstanding the provisions contained in section 350 of the Code of Civil Procedure of the state, to the effect that an action could only be maintained against a county upon a contract made by such county in its corporate character; that an action was maintainable in favor of the county of G. against the county of L. to recover from the latter county such proportion of the said indebtedness; that the legislative assembly had power in such a case to impose an obligation upon a county, and the discharge of it became a corporate duty which could be enforced

17 453
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32 614
21* 447
29* 795
30* 462

17 453
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24 142
21* 447
31* 1061
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33 343
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36 120

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43 471
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46 36
46 82

Statement of Facts.

by an action at law, and that the right to such an action was not affected by said section 350 of the Code of Civil Procedure, which in terms limits actions against counties to strict matters of contract; that it was known as a part of the history of legislation upon the subject that said section 350 was only intended to amend section 347 of the former code of the state, so as to avoid the consequences resulting from a construction the court had given said latter section, which was to the effect that it permitted actions to be maintained against counties for pretended injuries received by persons, by reason of alleged defects in bridges upon the public highways; *held further*, that the fact that the indebtedness of the county of G. at the time of the passage of the said act exceeded the sum of five thousand dollars, did not support a finding of a conclusion of law; that the part of the indebtedness in excess of that sum was illegal and void; that the clause in the constitution of the state which provides "that no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars," etc., does not imply that all debts and liabilities against a county over and above said sum are necessarily obnoxious to said provision; that the provision only applies to debts and liabilities beyond said sum which a county in its corporate character, and as an artificial person, voluntarily creates.

COUNTY — INTEREST TO PAY WHEN. — *Held, also*, that interest should not be allowed upon a claim against a county until a warrant therefor has been presented to the treasurer thereof, and an indorsement made thereon, "Not paid for want of funds," and the date of such presentment over the treasurer's signature.

APPEAL from the Circuit Court for the county of Klamath.

Zera Snow, for Grant County.

C. A. Cogswell, for Lake County.

At the special session of the legislative assembly of the state, held in November, 1885, it was enacted that a certain portion of territory should be taken from Grant County and annexed to Lake County. The act was approved November 21, 1885, and took effect at that time. Section 2 of the act provides as follows:—

"Sec. 2. The treasurer of Lake County shall pay to the treasurer of Grant County such a portion of the indebtedness of Grant County as the taxable property of the territory described in section 1 bears to the whole

Statement of Facts

amount of taxable property of said Grant County, not to exceed five thousand dollars, as said taxable property appears by the assessor's roll of the year 1884."

Subsequently, and on the third day of August, 1887, Grant County commenced an action against Lake County to recover the amount due to the former, under and by virtue of said section 2 of said act. It was alleged in the amended complaint filed in said action that the plaintiff and defendant therein were duly organized counties in the state of Oregon; that the said act was passed and contained the terms herein set out; that at the time it went into effect, — November 21, 1885, — the indebtedness of Grant County was the sum of \$44,501.29; that on said date the taxable property of the territory so taken from Grant County was the sum of \$302,152; that at said date the whole amount of taxable property of Grant County, as said taxable property appeared by the assessor's roll of the year 1884, was \$3,125,352; that on said date there was due to plaintiff, from the defendant, the sum of \$4,298.82; for which sum the plaintiff demanded judgment. To which complaint the defendant in said action filed an answer denying any knowledge or information of any indebtedness of Grant County, as alleged in the complaint, or that the taxable property of the territory taken from Grant County was, on said date, or at any other date, the sum of \$302,152, or any other sum; and denied that there was anything due from defendant to plaintiff, as alleged in the complaint.

These were the main issues in the pleadings. A demand of the amount due from the defendant to the plaintiff was alleged in the complaint and denied in the answer.

Afterwards, and at the June term, 1888, of the said circuit court, the said action coming on for trial, and a jury trial thereof having been duly waived, the same was tried before the court without a jury.

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Said court upon said trial found the following facts: "1. On the twenty-first day of November, 1885, Grant County was indebted in the sum of \$44,501.29; 2. The taxable property of Grant County, as shown by the assessor's return for the year 1884, amounted to the sum of \$3,125,352; 3. The taxable property of that part of Grant County which was annexed to Lake County amounted to the sum of \$302,152; 4. The taxable property of that part of Grant County which was annexed to Lake County amounted to nine and sixty-six one hundredths per cent of the whole taxable property of Grant County." And upon said facts said court found the following conclusions of law: All that part of the indebtedness of Grant County in excess of five thousand dollars is illegal and void, so far as this defendant is concerned. The plaintiff is therefore entitled to recover of the defendant nine and sixty-six one hundredths per cent of five thousand dollars, with interest thereon at eight per cent per annum from the twenty-first day of November, 1885. Judgment having been entered in accordance with the said findings of law, both parties took an appeal therefrom to this court, which is the appeal before referred to.

THAYER, C. J.—Why it should have been necessary to resort to litigation regarding the matters involved herein is beyond my power to conjecture. The act in question is very plain and simple. The citizens of Lake County evidently desired that a certain part of the territory of Grant County be detached therefrom and attached to their county, and the legislature enacted that it be done; but inasmuch as Grant County was indebted in a large sum, and the effect would be to curtail its source of revenue, a provision was inserted in the act that the treasurer of Lake County should pay to the treasurer of Grant County such a portion of the indebtedness as the taxable property

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of the territory taken therefrom bore to the whole amount of its taxable property, not to exceed five thousand dollars, and the assessor's roll for Grant County for the year 1884 was made the basis from which said amount of the taxable property and such proportion thereof were to be ascertained.

The circuit court found as a fact that Grant County was indebted in the sum of \$44,501.29; that its taxable property, as shown by the assessor's roll for said year 1884 amounted to the sum of \$3,125,352, and that the taxable property of the territory taken therefrom and annexed to Lake County was one ninth and sixty-six one hundredths of a ninth thereof; and there seems to be no disagreement between the parties as to the correctness of this finding. All that was necessary, therefore, to a proper adjustment of the matter, was for the treasurer of Lake County to pay the treasurer of Grant County that proportion of the said amount of indebtedness. Such seems to have been the obvious intention of the legislature, and Lake County should, with reasonable promptness, have discharged the obligation thus imposed upon it. The legislature, as said by Sawyer, J., in *People v. Alameda County*, 26 Cal. 648, "may divide counties and create new ones, or change the boundaries, as in its wisdom it may deem the public interest to require; and in creating new counties out of territory taken from counties already organized, it is but just that it should apportion the debts already accrued between the new and the old counties in the ratio of the territory, population, taxable property, and benefits conferred on the respective counties or portions of counties affected by the change."

Lake County set up no defense to the action, beyond a denial of the complaint, and its counsel relied wholly upon legal technicalities to prevent a recovery in the case. The main point of their contention was, that since

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the amendment of section 347 of the former code, which is section 350 of the present one, no action can be maintained against a county in this state, except as therein provided. That an action cannot be maintained against a county except for a cause authorized by statute, is no doubt a correct proposition of law.

A county, as defined and described in 4 American and English Encyclopedia of Law, title "County," is: "One of the civil divisions of a state for judicial and political purposes; a local subdivision of a state, created by the sovereign power of this state of its own will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; a local organization, which, for the purpose of civil administration, is vested with a few functions of corporate existence."

And no one would contend that an action could be maintained against such an organization unless the right were given by the power creating it.

Under the code of this state, however, the authority to maintain an action against a county is not derived from said section 350, but exists independently of it.

Section 2239, Miscellaneous Laws, provides that "each county shall continue to be a body politic and corporate for the following purposes, to wit: To sue and be sued; to purchase and hold for the use of the county lands lying within its own limits, and any personal estate; to make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county." Hence if section 350 as amended, or the original section 347 as it stood prior to the amendment, had never been adopted, an action could have been maintained by or against a county for any cause affecting its rights or duties as such corporate body. For the purposes for which a county is made a body corporate and politic, it is a person, and is capable of suing and being sued in regard to

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matters pertaining to those purposes the same as an individual. Its powers as a corporate body, are, however, very limited, they extend only to the subjects enumerated in the section of the laws referred to; but the mere vesting of any corporate powers in a county organization would, in my opinion, authorize it to sue or be sued without any express provision to that effect. Creating a body corporate for any purpose would, impliedly, it seems to me, confer upon it the incidental powers belonging to a corporation, which include the power to sue and be sued. Nor do I believe that the legislature, in amending said section 347 of the code, intended to limit such right. It is well known as a part of the history of the legislation of the state how that amendment came about. Said section, prior to the amendment, read as follows:—

“An action may be maintained against a county or other of the public corporations mentioned or described in section 346, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.”

This court in *McCalla v. Multnomah County*, 3 Or. 424, in an action to recover damages caused by the plaintiff's child falling through a hole in a bridge on a country road in said county, held that the clause in said section 347, which reads, “Or for an injury to the rights of the plaintiff arising from some act or omission of such county,” etc., gave the plaintiff a right of action for the injury. The court there held that road supervisors were agents for the county, and the county was liable for their negligence in not repairing a bridge. Such agency seems to have been inferred from the fact that all county roads were under the supervision of the county court in the county in which they were situated; that it was the duty

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of the county court to appoint supervisors in the various road districts of the county, and it had power to remove them on failure to perform their duties.

It is unnecessary to say that the logic of that decision was not appreciated by the members of the bar; but its doctrine was enforced until the people of the various counties got tired of having to pay the damages to unscrupulous claimants for pretended injuries, in consequence of alleged defects in roads and bridges, and the legislature concluded to change it, by declaring, in the emphatic language of said section 350 of the present code, that "an action may be maintained against any of the organized counties of this state, upon a contract made by such county in its corporate character, and within the scope of its authority, *and not otherwise.*"

The evident object of this amendment was to escape from the pernicious consequences resulting from the decision in *McCalla v. Multnomah County*, the soundness of which, in the opinion of a number of attorneys, was at least doubtful. It requires considerable credulity to believe that a road supervisor, who is appointed by law, and required to take an oath of office that he will faithfully discharge the duties thereof, and who, if required by the county court appointing him, must enter into an undertaking to the county, with sureties in the sum of a thousand dollars, to the effect that he will faithfully account for and pay over to his successor all moneys that may be in his hands, by virtue of his office, is an agent of the county, and that the latter is liable to damages in consequence of his dereliction of duty.

In any event, the said amendment must be construed in connection with said section 2239 of the Miscellaneous Laws, which subjects a county to a suit on account of any matters arising out of its corporate obligations, whether created by contract or otherwise. In the case

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under consideration, the legislature took from Grant County a certain part of its territory and annexed it to Lake County; and because it thereby lessened the resources of the revenues of Grant County, and increased those of Lake County, it shifted a proportionate part of the indebtedness of the former county on to the latter, and, in effect, required the latter-named county to pay it to the former. The legislature by that act created a corporate obligation in favor of Grant County, and against Lake County; and as it provided no particular mode for enforcing it, it follows that an action at law is the proper remedy.

Section 349 of the code clearly gives a right of action in favor of a county to enforce such an obligation. It provides that an action at law may be maintained by a county, incorporated town, school district, or other public corporation of like character, etc., "upon a liability prescribed by law in favor of such public corporation"; and unless, therefore, section 350 of the code absolutely exempts a county from being sued on account of such liability, the action herein was maintainable.

In my opinion, the latter section should not be construed so as to exempt a county from being sued for the violation of a strict corporate duty; that in a limited sense a county is an artificial person, and so far as it is clothed with powers of a private nature, or such as pertain to a private corporation, it is responsible for its obligations, whether it expressly contracts them or they arise by operation of law, the same as a natural person.

The counsel for Lake County also contend that the power to determine the amount of the Grant County indebtedness to be paid by Lake County is legislative, and that the courts have nothing to do with it; that if the legislature has failed to provide in what manner the amount of the indebtedness shall be ascertained, the court

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cannot supply the defect. They further contend that the complaint does not state facts sufficient to constitute a cause of action, as it alleges what the taxable property in that portion of Grant County annexed to Lake County was on the twenty-first day of November, 1885, and not what it was as appears by the assessor's roll of the year 1884, as mentioned in the act; and further, that it is not alleged in the complaint that the county court for Lake County refused to audit and allow the claim in favor of Grant County; and for all that appears in the complaint, the latter county may now have a warrant drawn upon the county treasurer of Lake County for the money demanded.

As to the first of these latter contentions, it is sufficient to say that the legislature did not fail to provide in what manner the amount of the claim to be paid by Lake County to Grant County should be ascertained; it makes the assessment roll of 1884 the basis for the apportionment of the indebtedness of Grant County; and furnishes ample data for determining the amount to be paid by Lake County.

I think the complaint contains a cause of action, although the amount of taxable property taken from Grant County and annexed to Lake County, as appears by the assessor's roll of the year 1884, is not alleged therein. The allegation in the complaint is to the effect that, on November 21, 1885, the time when said act went into effect, the taxable property of the territory so taken from Grant County was the sum of \$302,152. The pleader should have alleged what proportion the taxable property of the territory taken from Grant County and annexed to Lake County bore to the whole amount of taxable property of said Grant County, as said taxable property appeared by the assessor's roll of the year 1884.

I think he aimed to do that; but the language he em-

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played would seem to leave a contrary inference. He, however, set out the terms of the act, and the counsel for Lake County could not have been misled by the manner of his statements, and the circuit court appears to have adopted, in that particular, the proper basis of adjustment. The objection to the complaint that it is not alleged therein that the county court for Lake County refused to audit and allow the claim in favor of Grant County is not well taken. Such audit and allowance would be payment, and the defendant, in order to avail itself of it, must plead it.

The remaining question for consideration in the case is, whether the conclusion of law that "all that part of the indebtedness of Grant County in excess of five thousand dollars is illegal and void so far as the defendant is concerned," is supported by the finding of the fact, that "on the twenty-first day of November, 1885, Grant County was indebted in the sum of \$44,501.29." The circuit court seems to have assumed that a county could not legally become indebted in a sum in excess of five thousand dollars; that the fact of its owing more than that amount rendered the part thereof exceeding it illegal. This, I think, was erroneous. The constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion, does not imply that all debts and liabilities against a county over and above that sum are necessarily obnoxious to that provision. To justify the court in finding the said conclusion of law, it should have found that the county *created* the indebtedness. Counties do not create all the debts and liabilities which they are under; ordinarily such debts and liabilities are imposed upon them by law. A county is mainly a mere agency of the state government,—a function through which the

state administers its governmental affairs,—and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot in reason be said to have been created in violation of the provision of the constitution referred to, as they are really created by the general laws of the state, in the administration of its governmental affairs. Said provision of the constitution, as I view it, only applies to debts and liabilities which a county, in its corporate character, and as an artificial person, voluntarily creates. The circuit court should, therefore, have found, as a conclusion of law from the said fact found by it, that said county of Grant was entitled to recover of the said county of Lake nine and sixty-six one hundredths per cent of the said \$44,501.29, which, according to my computation, is \$4,298.82.

The circuit court allowed interest upon the amount found due, but I doubt very much whether interest should be allowed on a claim against a county until a warrant therefor has been presented to the county treasurer for payment, and payment refused for want of funds. (Sec. 2465, Code, Misc. Laws.)

The case must be remanded to the said circuit court, with directions to enter a judgment, upon the facts found by the said court, in favor of Grant County, the plaintiff in the action herein, and against Lake County, the defendant in said action, for the sum of \$4,298.82; that neither party recover cost upon the appeal, beyond the proper disbursements incurred on the appeal, including the fees of the clerk of this court, which disbursements and fees shall be taxed against Lake County.

[Filed April 16, 1889.]

GEARY ET AL., APPELLANTS, v. PORTER, RESPONDENT.

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38	170
38	174

DEED INTENDED AS A MORTGAGE. — A party who takes a mortgage in the form of an absolute deed is bound to observe the most scrupulous good faith; and if questioned by a creditor of the mortgagor, or other person having an interest in knowing the fact, he must carefully and truly disclose the true nature of his security. An untruthful statement touching a material fact in relation to such security, or a failure to make a full and true disclosure when required, will postpone such security to that of a subsequent attaching creditor.

ID. — A deed intended as a mortgage, while good between the parties, is to some extent a questionable security when the interests of third parties are concerned. It tends to cover up and keep concealed the real nature of the transaction between the parties, and will therefore be closely scrutinized.

APPEAL from Linn County.

Wolverton & Irvine, for Appellants.

J. K. Weatherford, for Respondent.

STRAHAN, J.—This is a suit to foreclose a mortgage given in the form of an absolute deed. A copy of the instrument is attached to the complaint. It is for the consideration of one dollar, and purports to convey to the plaintiff, with covenants of general warranty, a fee-simple title to the granted premises. It was executed on the twenty-ninth day of December, 1886, and recorded the same day in the record of deeds of Linn County.

The complaint avers, amongst other things, that at the time of the execution of this instrument, Nancy J. Sippy was indebted to the firm of Smith and Geary in the sum of \$188.25, and at the same time she was also indebted to Koontz and Lane in the sum of \$139.02, and that in consideration that the plaintiff would assume the payment of the two claims, she executed and delivered to him the said conveyance. It is then stated that said conveyance

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was intended as a mortgage, and a parol defeasance is alleged. The respondent, Martha A. Potter, is joined as defendant, because it is alleged she has or claims some interest in the premises by way of judgment lien, but that whatever her interest, the same is subsequent and subject to the plaintiff's lien.

The indebtedness set out in the complaint is denied by the answer, or that the plaintiff assumed the same. The answer alleges, for a further and separate defense, that on the fourteenth day of May, 1887, one T. J. Black commenced an action in the circuit court of Linn County to recover of Sippy the sum of \$150.62, and caused a writ of attachment to be duly issued in said action, and the premises in controversy to be attached; that on the fifteenth day of March, 1888, judgment in said action was duly rendered and given for the sum of \$64.66, with costs and disbursements taxed at \$65.50; that thereafter said Black duly assigned said judgment to the defendant Porter, who caused an execution to issue on said judgment, and the attached premises to be sold by virtue of said execution, on the twelfth day of May, 1888, and that at such sale she became the purchaser thereof. It is then alleged that at and during all of said times Sippy was insolvent, and that after she became indebted to Black she conveyed the land in controversy to the plaintiff, with the intent to hinder, delay, and defraud said Black and other creditors, and that the plaintiff had notice of such fraudulent intent at the time, and that he paid nothing for said property, and that this defendant has been thereby hindered and delayed, etc.

It is then alleged that the plaintiff has been in the possession of said premises since the 29th of December, 1886, receiving the rents and profits thereof to the amount of \$180, which it is alleged ought to be credited on any lawful claim he may appear to have.

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A reply put the new matter in the answer at issue, except the claim of Black, the institution of the action by him against Sippy, the attachment of the premises in controversy, the assignment of the judgment to Porter, and the sale and purchase thereof by her.

The cause was then referred, and the evidence taken in writing, and upon a final hearing in the court below said court found for the defendant on the issue presented by her, and dismissed the suit, from which the plaintiff has appealed.

1. The evidence tends to show that Sippy was indebted to Smith and Geary and to Koontz and Lame in the amounts alleged at the time of the execution of the deed; that Geary has never paid anything whatever for said land, or on account thereof. He says expressly that the agreement was, that the claims should be paid out of the proceeds of the sale of the place when it should be sold, and the residue was to be paid to Mrs. Sippy. Under this state of facts, Geary incurred no liability to Koontz and Lame, or to his copartner Smith, unless they should see proper to charge the property in his hands, as being held in trust for them. In that event, the property would be reached, and Geary would not be subjected to any individual liability, unless he abused his trust. The evidence tends further to prove that Geary went into the possession of the premises about the date of the deed, and exercised all the authority of owner receiving the rents. These he quietly paid over to Mrs. Sippy, which he says she was to have under the arrangement with her. The evidence also tends to prove that Mrs. Sippy was disputing Black's claim; said it had been paid, and that she did not propose to pay it again. This she told Dr. Smith at the time she was arranging the terms of the conveyance to Dr. Geary. Dr. Smith is of the firm of Smith and Geary, and conducted all of the negotiations in respect to this conveyance. He

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arranged the terms and conditions, and reported them to his partner, who acquiesced. It also appears that Mrs. Sippy disputed Black's claim, and told him she never intended to pay it unless compelled to. It further appears from the evidence that when Black inquired of Dr. Smith and Dr. Geary concerning the Sippy property, each of them told him, at different times, that their claim against Sippy was about two hundred dollars, and that they had paid her in money five hundred dollars more, making the purchase price of the property seven hundred dollars, and that Dr. Geary said the property belonged to him. Dr. Geary also told the defendant Porter that the property had cost him in the neighborhood of \$700, but he would let her have it for \$650, and if she did not want it at that she could go ahead. This was after Mrs. Porter had acquired the Black claim. Dr. Geary also informed W. J. Stewart, who was the administrator of the partnership estate of Black, Porter, & Co., when asked about it, that he had bought the Widow Sippy's property. Dr. Smith also told Joseph Pearl "that Black need not trouble himself, for we have bought the property, and have a deed for it."

There is much more evidence of the same sort, but its recapitulation is not deemed necessary.

After a very careful consideration of all of the evidence, I am unable to find that the plaintiff is entitled to that priority which he claims. Mrs. Sippy, by this deed to Dr. Geary, was undoubtedly attempting to hinder and delay Black in the recovery of his debt. If Drs. Smith and Geary did not have actual knowledge of Mrs. Sippy's intent, they knew enough of the facts and circumstances to have put them on their guard,—to have made them cautious, to have required them to proceed with care and deliberation; but if they had taken a mortgage to secure their own debt, or even their own debt with Koontz and

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Lame, and then allowed the true nature of the transaction to have been public, their claim would not have been postponed to that of the defendant.

But here the form of security which they selected, while good between the parties, was questionable where the interests of third parties are concerned. It was one which upon its face did not disclose the true nature of the transaction. It was therefore calculated to deceive and mislead. In addition to this, when Drs. Smith and Geary were questioned as to the true nature of the transaction, they did not make that certain and direct and straightforward disclosure which the defendant's assignor and the defendant herself had a right to require. Their statements, whether designed to be so or not, were misleading. The effect of their course upon the rights of the defendant was just as disastrous as though the most flagrant fraud had been actually intended. Still, under the circumstances, I do not feel inclined to visit them with all of the consequences of actual fraud; in their anxiety to secure their own debt, and to favor Koontz and Lame, they may not have fully weighed and considered the effect of their acts and words on the rights of other parties. However that may be, I think they made such fraudulent use of their deed as postpones it as a lien to the claim of the defendant Porter. The property in controversy will therefore be decreed to be sold, and Mrs. Porter will first be paid the amount of the judgment referred to, with all costs and disbursements therein, including the costs and disbursements on the execution, with interest on all of said sums from the dates they ought properly to draw interest, and the residue, if any, will be paid over to the plaintiff. The attitude of the plaintiff in this litigation entitles the respondent to her costs in this court. In this case we have not considered, and do not decide, anything as to the effect of recording a mortgage in the record of deeds,

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which is made in the form of an absolute deed, nor whether the amount of the actual consideration can be shown against a subsequent attaching creditor, where there is nothing in the record to disclose what the real consideration was. These questions were not discussed, and they are too important to be passed upon without a careful examination at the bar. And in this particular case the conclusion we have reached seems to render their decision unnecessary.

[Filed April 22, 1889.]

KINKADE, APPELLANT, v. MYERS, RESPONDENT.

A GENERAL APPEARANCE waives all questions as to the service of a process, and is equivalent to a personal service.

A SPECIAL APPEARANCE, designating the particular purpose for which the party appears, limits the appearance to that particular matter.

WHERE THE SERVICE OF A SUMMONS IS ILLEGAL and fatally defective, a defendant may appear therein specially for the purpose of having such service set aside, and there is nothing in the Oregon code restrictive of such rights.

APPEAL from Benton County.

J. W. Rayburn, for Appellant.

John Kelsay, for Respondent.

LORD, J.—This was an action brought in a justice's court to recover money. After judgment therein, a writ of review was sued out in the circuit court, which resulted in the affirmance of such judgment and the dismissal of the writ.

The case involves but one question for our determination. Briefly, the facts are these: It is admitted that the service of the summons and complaint, as shown by the constable's return, was insufficient to authorize the court

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to render judgment against the defendant, if he had not appeared in the action. The record discloses that he appeared specially and only for the purpose of moving to set aside the return of the constable as to such service of the summons and complaint which the justice's court overruled, and the defendant not appearing, further, also, rendered judgment against him for the amount demanded in the complaint, and costs and disbursements of the action.

The question then is, Can a party specially appear in an action or other proceeding, for the purpose of setting aside the service of the summons? or does such appearance waive the failure to properly serve the summons, and give the court jurisdiction of the person of the defendant?

The contention of the plaintiff is, that an appearance for any purpose, special or otherwise, is equivalent to service, and that although the defendant appeared specially, and without intending to confer jurisdiction of his person, it had the effect to confer jurisdiction, and to authorize the court to render judgment against him.

Neither of the cases cited, *Rogue River Mining Co. v. Walker*, 1 Or. 342, or *Harker v. Fahie*, 2 Or. 89, sustains this contention. In the first case, the party appeared and offered to file his answer; and in the second, there was a voluntary appearance, which was equivalent to service or waiver of any informality therein. A general appearance waives all questions as to the service of process, and is equivalent to a personal service. (*Eldred v. Michigan Insurance Bank*, 17 Wall. 551; *Meizell v. Kirkpatrick*, 29 Kan. 683; *Allen v. Coates*, 29 Minn. 46.) A special appearance, designating the particular purpose for which the party appears, limits the appearance to that particular matter. Here it was for the specific purpose, and no other, of setting aside the service, because it was illegal, and admitted to be fatally defective. The defendant claims that he had a right to so appear specially, and

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move to set aside the service of the summons, and that in so doing he did not waive such defects, or submit himself to the jurisdiction of the court.

In *Ling Chung v. N. P. R. R. Co.*, 10 Saw. 19, it was claimed that a defendant could not appear specially for this purpose, and that he must appear fully and without reserve, or not at all. Mr. Justice Deady, after referring to the sections of the Oregon code cited to sustain this view, said: "And the question is, Can that appearance be something short of a general appearance and for a particular purpose? There is nothing in the code to the contrary. . . . The right to appear specially and move to set aside the service of a summons is one thing, and the allowance of the motion is another. When the summons, or the service thereof, is merely defective, or wanting in some matter of form or method which does not affect the substantial rights of the defendant, the motion to set aside will be disallowed, and a counter-motion allowed to amend. But where the service is unlawful, and cannot give the court jurisdiction of the defendant, it ought to be set aside or quashed, and unless the party upon whom it is made is allowed to appear for the purpose, he must run the risk of having a judgment given against him for want of an answer, in a case where it may be there is no appeal, and if there was, the illegality of the service is not apparent on the face of the record. In *Lyman v. Milton*, 44 Cal. 635, and *Kent v. West*, 44 Cal. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and in the other, to set aside the illegal service of a legal summons; and further, that the wrongful denial of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case. The cases under consideration are within the ruling made in these cases, and I see nothing in the code to take

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them out of it. Nothing less than the express language of the statute, or the necessary implication therefrom, would be construed by any court of justice as forbidding or preventing a party to appear in an action for the purpose of having the service of a summons set aside on the ground that it was illegally served upon him,—not in manner, but in substance,—and made under such circumstances as not to give the court jurisdiction of his person, or authority to proceed to judgment against him.”

In the case in hand, the service is admitted to have been unlawful, and could not have given the court jurisdiction of the defendant; and in such case we see no reason, or anything in the code, why he should not be allowed to appear specially for that purpose, and that in so doing he does not give the court jurisdiction of his person, or authority to proceed to judgment against him.

Judgment is reversed.

[Filed April 22, 1889.]

THOMAS CAUFIELD, APPELLANT, v. W. E. CLARK,
RESPONDENT.

WHERE A PERSON, UNDER A MISTAKE as to the boundaries, enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake.

APPEAL from the Circuit Court for the county of Polk.

G. G. Bingham, for Appellant.

Daly & Butler, and Warren Truitt, for Respondent.

LORD, J.—This is a suit to determine an adverse claim to certain real property described in the complaint, and

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32* 404

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to enjoin the defendant from entering upon and taking possession of the same.

The material issue presented by the pleadings, and to which the evidence is chiefly directed, is the title to such property. The claim of the plaintiff is based on adverse occupancy, and his evidence is directed to establishing his title thereto. The defendant claims the same through duly recorded conveyances to and through his predecessors. It is not disputed but that the plaintiff has included the same lands in controversy in his premises, and that he has occupied the same for more than the statutory period. The contention of the defendant is, that the plaintiff and himself were mutually mistaken as to the true boundary between the premises owned by them, and that whatever use and occupancy to which the plaintiff and his grantors have subjected said lands, has been under a mistake of the true line, and therefore, within the meaning of the law, does not constitute an adverse holding. The matter in dispute turns wholly on the evidence, and the conclusions to be derived from it, within legal principles, will be decisive of his case.

It is not controverted that if the plaintiff held his possession under mistake or ignorance, but with no intention to claim beyond the true line when discovered, his adverse possession can be maintained against the real owner. In such case, his possession of the land, being by mistake, and not under a claim of right against him, was seised, or with an intention to occupy the land beyond the true boundary when disclosed, does not have the effect to work a disseisin. But the plaintiff claims that this rule is inapplicable to him upon the facts as presented by this record. He insists that the evidence will show that he entered upon and occupied the land in controversy, claiming it as his own, and that no other deduction can be drawn therefrom than his intention to claim it adversely.

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"If one by mistake," said Henry, J., "inclose the land of another, and claim it as his own, his actual possession will work a disseisure, but if ignorant of the boundary line, he makes a mistake in laying his fence, *making no claim, however*, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse." (*Washburn v. Ballen*, 68 Me. 164; *Hutching v. Morrison*, 72 Me. 334.)

Mr. Wood says: "The rule has been adopted in some of the states, that where a person takes possession of lands, and through inadvertence or ignorance as to the true line takes and holds possession of land not covered by his deed, with no intention of claiming or occupying beyond his actual boundaries, such possession will not support a plea of the statute against the real owner, because in such case the possession lacks an essential requisite, namely, an intention to declare adversely, which is an indispensable ingredient to constitute a disseisure. This doctrine has been denied in Connecticut; and in all cases, if a person under a mistake as to the boundaries enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake." (Wood's Limitations of Actions, sec. 263, and cases cited in notes.) The principle stated in this last clause just cited is the rule which the plaintiff insists is applicable to the facts of this case.

No good purpose can be served by encumbering this record with the evidence. It will be sufficient to give the result of our conclusions, as it has impressed us after a careful examination. No question is made as to the extent, duration, or continuity of the plaintiff's occupation.

Points decided.

If his case rested upon that, his title would go uncontroverted by the defendant. But it is the fact claimed by the defendant, that his possession was not accompanied by a claim of title,—that it was only a mistake as to the true line, with no intention of claiming beyond his actual boundaries,—that raises the question to be decided.

In our judgment, the evidence, taken as a whole, will not warrant this conclusion. We think it is fairly established by the evidence that the plaintiff has occupied and claimed title to the fence as originally located, which was not on the line as described in the deed, although by mistake he supposed it was on such line. It seems to us, also, that the action and conduct of the defendant in respect to this fence, in some particulars, as appears by the evidence, strengthens this conclusion. We think, therefore, the fence has become the true boundary line of the adverse possession, and that the plaintiff is entitled to have the decree of the court below modified, so as to establish such line in accordance therewith; but it is affirmed in all other respects, and it is also ordered that neither party recover costs in this court.

[Filed April 22, 1889.]

WALLACE, RESPONDENT, v. SCOGGINS, APPELLANT.

PAROL LEASE FOR TERM EXCEEDING ONE YEAR.—Under section 785, subdivision 6, Hill's Code, an agreement for the leasing of land for a longer period than one year is void, unless the same or some note or memorandum expressing the consideration be in writing, and subscribed by the party to be charged, or his lawfully authorized agent.

PAROL AGREEMENT—PART PERFORMANCE.—But where such parol agreement was made, and the same has been partly performed, it is taken out of the operation of the statute of frauds, and a court of equity has power to specifically enforce the same.

WHEN THE PLAINTIFF PARTLY PERFORMED A PAROL AGREEMENT for a lease for more than one year, incurred expenses, and changed her circumstances

Opinion of the Court—Strahan, J.

and condition to such an extent that a refusal on the part of the defendant to perform such parol agreement would operate as a fraud on the plaintiff, such agreement will be specifically enforced in equity.

SPECIFIC PERFORMANCE—LEASE FOR MORE THAN ONE YEAR.—An agreement for a lease for more than one year is an agreement for an "estate or interest in real property," and in a proper case may be specifically enforced in equity, on the same terms and under the like circumstances that any agreement concerning land is or may be specifically enforced.

APPEAL from Multnomah County.

Williams & Wood, for Respondent.

A. H. Tanner, for Appellant.

STRAHAN, J.—This is a suit in equity whereby the plaintiff seeks the specific performance of a parol lease of certain premises situated in the city of Portland. In her complaint, the plaintiff, in substance, alleges that on or about July 1, 1888, the plaintiff rented from the defendant the property in the city of Portland known as No. 247 Alder Street, for the term of two years, at the rent of forty dollars per month; that about the time said lease was made, and in pursuance thereof, plaintiff entered into the possession of the said premises; that she cut and fitted expensive carpets for the house, painted certain portions of the inside thereof, and expended a large sum of money in fitting up said house, to be used as a residence during said two years; that she purchased and placed in the cellar of said house a large quantity of coal and wood for her winter's supply, and that she regularly paid the rent at the end of each month, and has fully performed the contract of lease on her part; but that the said defendant, under the pretense that said lease was not in writing, commenced a suit against this plaintiff before B. B. Tuttle, a justice of the peace in Multnomah County, for the unlawful detainer of said premises, and prays that said contract of leasing may be specifically enforced, etc.

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The answer denies most of the allegations of the complaint.

The case, being at issue, was referred to Hon. Raleigh Stott to take the evidence and report the same, together with his findings of fact and law thereon, to the court. He found the facts to be substantially as alleged in the complaint, but found as a conclusion of law that the renting was valid for the term of one year, and therefore that the plaintiff had an adequate defense to the action of unlawful detainer; and he consequently reported for the dismissal of the suit.

Exceptions were taken to the report by each of the parties. The plaintiff moved to confirm the report, except the conclusion of law.

The defendant moved to confirm all of the report except the first finding of fact, which is to the effect that the plaintiff had rented the house from the defendant, for the term of two years, at a monthly rental of forty dollars, for her residence. The court below sustained the plaintiff's exceptions, and overruled those of the defendant, and entered a decree specifically enforcing said contract against the defendant, from which he appealed to this court.

1. The first question presented for our consideration is one of fact. Did the defendant lease said property to the plaintiff on the terms alleged in the complaint? After a careful reading and consideration of all the evidence in the case on this subject, I think this question must be answered in the affirmative. The plaintiff testifies to the facts and circumstances intelligently and distinctly, and she is corroborated in her statements by other evidence.

In addition to this, the facts and circumstances attending her occupancy tend very strongly to corroborate her; on the other hand, the defendant's denials are uncertain and equivocal. It is true, he makes the denials when forced to it by the direct interrogatory of his counsel;

but when left to himself, the inference becomes very strong that the defendant bases his denial on the fact, not that the plaintiff did not enter into a parol agreement with him for the lease of the premises for two years, but on the ground that the lease was not in writing. His remark to Mr. Williams was: "She didn't get a lease"; and on another occasion he said: "She had no lease for the house."

2. But this contract, not being in writing, and being for a lease for a term exceeding one year, was, under sections 781 to 785, subdivision 6, Hill's Code, ineffectual, *at law*, to create such title or interest as the plaintiff claims under it. But the plaintiff alleges part performance of said agreement on her part, and relies upon that to take the case out of the operation of the statute, and to that aspect of the case our attention must be directed.

3. It appears from the evidence that the plaintiff, with the consent of the defendant, entered into the possession of said premises, pursuant to said contract, about the 1st of July, 1888, and continued to reside there, without objection from the defendant, until about the month of November, during which time she paid the defendant the rent stipulated by said agreement.

At the time or soon after she took possession of said premises, the plaintiff caused some shrubbery—rose-bushes and the like—to be removed to said premises and planted in the yard; she purchased some expensive carpets, and had them cut and put down in the rooms; she caused considerable paper-hanging and painting to be done about the house, and enough coal and wood to be placed in the cellar to last her during the winter next ensuing after her occupancy commenced. In short, she did everything that a tenant would have done who understood that his occupancy was for a greater length of time than from month to month.

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Do these acts, as part performance of this lease, on the part of both parties to this lease, entitle the plaintiff to have the same specifically enforced? I think they do. They are substantial on both sides, and go to the substance of the contract, and it would hardly be possible to restore the plaintiff to the condition she was in before the acts were performed.

Relying upon the terms of the parol agreement, she incurred expenses, and changed her circumstances and condition, to such an extent that a refusal on the part of the defendant to perform operates as a fraud on the rights of the plaintiff. As I understand the rule, this is such a part performance of the parol agreement as takes the case out of the operation of the statute of frauds. (*Arnello v. Edinger*, 10 Cal. 150; *Hotchkiss v. Downey*, 2 Day, 225; *Wilde v. Fox*, 1 Rand. 165; *Kidder v. Barr*, 35 N. H. 235; *Hawkins v. Hunt*, 14 Ill. 42; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Eyre v. Eyre*, 19 N. J. Eq. 103; *Putnam v. Hattey*, 24 Iowa, 425; *Kay v. Watson*, 17 Ohio, 27; *Waterman on Specific Performance*, sec. 257.)

4. Upon the argument, counsel for the appellant insisted that though we might be satisfied that the parol agreement was made as alleged, and that there had been such part performance as would take the same out of the operation of the statute of frauds, still this is not the kind of a case in which a court would decree a specific performance, and that the plaintiff must fail for that reason. But in this I think the counsel is mistaken.

Pomoroy on Specific Performance, sec. 101, says: "As the statute speaks of lands, 'or any interest in or concerning them,' contracts to lease are both included within its terms, and are capable of being part performed so as to be taken out of the operation of the statute, and made enforceable in equity. In most of the American statutes all possible doubt upon this point has been removed by

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adding a clause to the section concerning lands which expressly includes agreements to lease for a time not exceeding one year." This provision is found in our own statute. (Hill's Code, sec. 785, subd. 6; Taylor's Landlord and Tenant, sec. 32.)

But it is useless to follow the subject. The authorities are uniform in favor of the rule I have stated.

5. The finding of the learned referee to the effect that plaintiff's parol lease was good for a year, and therefore she had a good legal defense to the pending proceedings of unlawful detainer, did not go far enough. Her rights rest upon a more substantial equity than a defense to that proceeding. It is right to have the parol agreement specifically enforced by a decree so that the same shall be fixed and certain, and that she may not again be subject to be harassed and vexed by such a petty proceeding.

The decree of the court below was right, and the same is affirmed.

[Filed April 24, 1889.]

J. N. SPERRY ET AL., APPELLANTS, v. THE CITY OF
ALBINA ET AL., RESPONDENTS.

A SUIT IN EQUITY CANNOT BE MAINTAINED BY A LOT-OWNER in any incorporate city against the officers thereof, to restrain proceedings in the improvement of a street therein, on which such lot abuts, upon an apprehension that the officer will attempt to charge a part of the expense of the improvement upon the lot. Such suit can only be maintained where there has been an attempt under the proceedings to sell the lot, or the proceedings are of such a character that they necessarily will cast a cloud upon the title of the lot-owner.

APPEAL from a decree of the circuit court for the county of Multnomah, dismissing the appellants' complaint after a demurrer thereto had been sustained. The appellants alleged in their complaint that the respondents, the city

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of Albina, is a municipal corporation created by an act of the legislative assembly of the state of Oregon, approved February 4, 1887, and was vested with the usual and ordinary powers of a body corporate, and that the other respondents were its mayor, common council, and recorder; that among the powers to be exercised by the said officers was the authority to grade, improve, and keep in repair highways, streets, and alleys within the city, and to provide a means of defraying the expenses thereof; that among the streets and highways within the corporate limits of the city was Helm Street, upon which appellants were adjacent and abutting property owners; that on the twenty-fourth day of February, 1888, the said city council ordered to be published, under the hand of the recorder, the following notice: "Notice is hereby given that the common council of the city of Albina, Multnomah County, Oregon, proposes to improve Helm Street, in said city, by grading the said Helm Street the full width thereof to the established grade from the north line of Russell Street to the center of Knott Street, and to grade the east half of Helm Street to the established grade from the center of Knott Street to the north line of Morris Street, and also by laying a first-class sidewalk from the north line of Russell Street to the south line of Knott Street, and by laying a third-class sidewalk from the south line of Knott Street to the north line of Morris Street, with cross-walks as provided for in section 7 of Ordinance No. 13." The said notice was so ordered, and was published, under the pretense and claim that it made public the fact that the said council proposed to grade and improve that portion of said Helm Street therein designated, and to which portion appellants' property is adjacent, in the manner and after the form prescribed by the charter of said city. That on the twenty-third day of April, 1888, the said council did un-

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lawfully, and without authority having by them first been established, make and enter into a contract with one Peter Lynch for the pretended improvement of the aforesaid portion of Helm Street, and by the terms thereof unlawfully creating a liability and lien against and upon the property hereinafter enumerated; and that the said Lynch, acting under said unlawful contract, did thereupon proceed to dig up and disturb the surface of the aforesaid portion of Helm Street, and to tear up and destroy the sidewalks thereon, to the irreparable damage of appellants; that on the twenty-first day of July, 1888, the said council did make and publish a certain ordinance numbered 37, declaring the cost and accepting the aforesaid unlawful and damaging work of the said Peter Lynch, and assessing the cost thereof, and did by said ordinance direct the respondent John T. Hughes, which he so did, to enter such assessments in the docket of city liens, unlawfully, against the several lots and parts of lots, and in the respective amounts as follows, to wit: J. L. Sperry, lot 1, block 2, \$66.72; J. L. Sperry, lot 2, block 2, \$60.68; J. L. Sperry, lot 3, block 2, \$39.75; J. L. Sperry, lot 1, block 3, \$62.60. The list includes, also, twelve other names, with the number of lot and block, and the amount assessed upon each; that said assessments stood upon respondents' lien docket, and appear unlawfully as liens against the several lots and parts of lots above enumerated and mentioned, and as a cloud upon the several titles thereto; and that appellants are informed and believe that the said council will proceed, or order to proceed, without delay the collection and enforcement of said pretended liens against said property, and disturb the several titles thereto, which are in appellants. And appellants further alleged for themselves and others owning the respective lots adjacent to the pretended improvement of Helm Street, and against which said illegal

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assessments were made and entered in the lien docket, that the aforesaid digging and tearing up of said Helm Street was without benefit to the general public, and did not enhance the value of the adjacent property above enumerated and mentioned, and sought by said council to be charged therewith; but, to the contrary, did irreparable damage to the same; that they had no notice published or given them of the intention of said council to cause to be made the said pretended street improvement at the expense of the property adjacent thereto, as required by subdivision 6, section 18, of the charter of the city of Albina, and that they were deprived of their privilege of remonstrance; that appellants have no speedy and adequate remedy at law. Wherefore, by reason of the foregoing premises, they pray judgment, etc. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of suit.

W. W. Page, for Appellants.

P. L. Willis, for Respondents.

THAYER, C. J.—The question to be determined in this case is as to the sufficiency of the appellants' complaint. The suit appears to have been predicated upon the ground that the proceedings to improve the street were irregular, and that the respondents would undertake to charge the expense of it upon their property abutting upon the street. The apprehension that such an attempt would be made seems to have arisen from the fact that the city council passed the ordinance numbered 37, declaring the costs, accepting the work of the contractor, and directing an entry of the assessment to be made in the docket of city liens, as the appellants term it. But if their view of the affair is correct, they are in no imminent danger of having to pay the expense of the improvement of the

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street. They allege, in effect, that no notice had been published or given of an intention upon the part of the said council to cause the improvement to be made at the expense of the property adjacent thereto, as required by subdivision 6, section 18, of the charter. That subdivision provides, as will be seen by a reference to the charter, as follows: "The council have power and authority within the corporate limits . . . to construct, clean, and repair sidewalks and cross-walks, or provide for the construction, cleaning, and repairing of said walks adjacent to real property by the owners of such property, and also for the making, cleaning, and repairing gutters; to grade, gravel, pave, plank, or otherwise improve and keep in repair highways, streets, and alleys; provided, that no property shall be assessed for the construction of such improvement for more than one half of its last county assessed valuation; provided further, that if two fifths of the property on such streets and adjacent thereto shall oppose such improvement by remonstrance, then such improvement shall not be ordered; provided further, that no property shall be taxed more than once for such improvements; and provided further, that in case of proposed street improvements, where the improvements proposed are to be made at the expense of the property adjacent thereto, thirty days' notice of such intention shall be given, by posting three notices thereof in public places of said city." Now, if this provision requires the notice to specify that the proposed street improvement is to be made at the expense of the property adjacent thereto in order to render it liable for the expense of the improvement, as the appellants seem to claim, and which I am inclined to believe is correct, then certainly no harm can come to the appellants on account of the proceedings herein. The city council, not having given any such notice, as required by the provision, will not be likely to proceed to enforce payment of

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the pretended liens against the property, or disturb the several titles of the appellants thereto; and if it should attempt to do so, its proceedings would be a nullity. At all events, the city council has not attempted to cause the property to be sold to satisfy the cost of the improvement, and until it takes some decided step in that direction, the appellants' rights in the premises will not be in such jeopardy as to demand the issuance of an injunction; and whether the appellants would then be entitled, under the rule adopted by courts of equity, to invoke such a remedy, is very doubtful.

Mr. Pomeroy, in his work on equity jurisprudence, volume 3, page 437, says: "In the absence of statutes giving *prima facie* validity to deeds or other proceedings, the following doctrine seems to be sustained by the great majority of American decisions: Where the instrument or proceeding constituting the alleged cloud is absolutely void on its face, so that no extrinsic evidence is necessary to show its invalidity, and where the instrument or proceeding is not thus void on its face, but the party claiming under it, in order to enforce it, *must necessarily* offer evidence which will *inevitably* show its invalidity and destroy its efficacy, in each of these cases the court will not exercise its jurisdiction either to restrain or to remove a cloud, for the assumed reason that there is no cloud."

The learned author indulges in a degree of criticism upon the rule as thus laid down which may be eminently just; but it is very questionable whether the court would be willing to disregard it in any case, unless some very extraordinary circumstance intervened.

It will be observed by an examination of the charter of the city of Albina that it makes no provision concerning the validity of a tax deed, or deed given upon the sale of property for street improvements. The validity of such a

deed under the provisions of the charter of that city must depend entirely upon the regularity of the proceedings authorizing the sale of real property for the non-payment of a tax or street assessment; and the party claiming under it is required to prove the regularity of the proceeding before the deed can be considered as having any force or effect. Neither does the said charter provide for any docket of city liens; hence the allegation in the complaint in regard to the assessment for the improvement of said Helm Street, standing upon the respondents' "lien docket," or being entered in the "lien docket of the respondents," amounts to nothing. The city authorities may have devised such a book, and caused the pretended assessments to be entered therein, but that would not give them the apparent effect of a legal lien. Such act would no more create a cloud upon title than a memorandum in an ordinary account-book. It would not be admissible as proof of a lien upon the property without showing that the various steps prescribed in the charter had been taken which would constitute a lien. I am unable to perceive any tenable ground for the suit, and in my opinion the circuit court properly sustained the demurrer to the complaint.

The decree appealed from will therefore be affirmed.

Opinion of the Court—Lord, J.

[Filed April 24, 1889.]

THE STATE OF OREGON, RESPONDENT, v. JOHN LEE, APPELLANT.

AS A GENERAL RULE, IT IS SUFFICIENT TO CHARGE A STATUTORY OFFENSE in the words of the statute, but when a more particular statement is necessary to set forth the facts with requisite certainty, then the particulars must be averred.

THE FLIGHT OF AN ACCUSED is a circumstance, in connection with other facts in the case, from which a jury may draw unfavorable inferences, but it is a fact to be proven by a person who knows it.

APPEAL from Washington County.

R. Williams, Thomas H. Tongue, and T. B. Handley,
for Appellant.

T. A. McBride, for Respondent.

LORD, J.—The defendant was accused by an indictment for larceny in defacing the artificial ear-marks upon a steer, the property of another, with the intent then and thereby to convert said steer to his own use, committed as follows: "The said John Lee, on the nineteenth day of July, A. D. 1887, in the county of Washington, and state of Oregon, did feloniously, willfully, and knowingly deface certain ear-marks upon a certain steer (said steer being then and there the personal property of H. W. Scott), by then and there unlawfully and feloniously cutting off the ends of both ears of said animal, with the intent then and thereby to deface said ear-marks as aforesaid, then and there, thereby feloniously to convert said steer to his own use, said steer being then and there of the value of ten dollars."

It is contended that this indictment does not state facts sufficient to constitute a crime, in this, that it does not describe the ear-marks and how they were defaced. As a

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general rule, it is sufficient to charge a statutory offense in the words of the statute, but there are exceptions to this rule, and when a more particular statement of facts is necessary to set forth such offense with requisite certainty, then such facts must be averred. (*State v. Sam*, 14 Or. 318.) This indictment states the offense in the language of the statute, and this is sufficient within the precedents under similar statutes.

Mr. Bishop has collected the cases bearing upon this subject, and evidently considers some of them as unsatisfactory. (Bishop's Statutory Crimes, secs. 454-461.)

For instance, in *State v. O'Neil*, 7 Ired. 251, the descriptive part of the indictment was as follows: "The defendant did unlawfully, knowingly, and willfully alter the mark of a certain cow, the property of Martha Beasen," etc., which the court held sufficient. "This," as Mr. Bishop says, "goes to the extreme of condensation"; and that "if he cannot pronounce it absolutely wrong in principle, still the form it sanctions plainly descends less in detail than is usual in the approved forms in analogous cases." (Bishop on Statutory Crimes, sec. 460.)

But it will be observed that the indictment in that case is much less explicit than in the case at bar, in that it not only failed to state what the mark was before alteration, but failed to state how it was altered. Here all the elements of the offense are charged. It is alleged in the indictment that the steer was the personal property of Scott, that there were artificial ear-marks upon it, and that the defendant defaced them by cutting off the ears, and that he did it with a felonious intent. Substantially, it conforms to the forms given by eminent text-writers (Bishop's Directions and Forms, sec. 166; 1 Wharton's Precedents, No. 479; Maxwell's Directions and Forms, 322); in fact, is fuller and more in detail than some of them. Every ingredient of which the offense is com-

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posed is stated with sufficient certainty to give the defendant notice of the charge. As a consequence, we hold the indictment sufficient. It is suggested, however, that the record discloses other matter which renders it impossible to sustain the conviction.

The witness Scott was asked: "State what ear-marks the steer had, which you lost, at the time you lost it." This was objected to, which the court overruled, and an exception was saved. The record recites that the witness was allowed to testify that there were certain artificial ear-marks on said steer, which said witness specifically described. My associates think this was error, for the reason that the question does not necessarily relate to the steer in controversy, and unless it did so, it was clearly incompetent.

Another objection is this: In certain cases, the flight of one accused of crime is permitted to be shown as a circumstance, in connection with other facts in the case, from which the jury may draw unfavorable inferences against the prisoner. The defendant being under recognizance on the third day of December, 1887, he failed to appear when called, and his default was entered of record in the cause. Upon the trial of this cause, as a circumstance to prove flight, the district attorney offered in evidence the record of the defendant's default on that occasion. This is also thought to be error, for the reason that there was no issue in the case as to whether or not, on that day, the defendant made default or not. The issue was one of guilt or innocence of the accused, and for that issue the record was incompetent. If the defendant fled, the fact could have been proven by any person who knew it, but his default in court on that particular day in no manner tended to prove it. Under the circumstances disclosed, it is considered that the effect of such evidence was prejudicial to the accused.

Points decided.

It is further suggested, as the record discloses that there was some evidence tending to show that the defendant claimed to own the steer; that being the case, it is important to observe the distinction noted in *State v. Chee Gong*, 16 Or. 534.

The judgment is reversed, and a new trial ordered.

[Filed April 24, 1889.]

S. MITCHELL, APPELLANT, v. IRA F. POWERS, Assignee, Respondent.

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18 344
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17 491
24 337
21* 451
33* 546

AN ORDER OR DECISION MADE BY A CIRCUIT COURT in proceedings to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors, denying to a creditor the right to a *pro rata* dividend in the assets of the estate of the assignor, is such a final decision, within the meaning of section 6 of article 7 of the constitution of the state, as entitles the supreme court of the state to revise it on appeal. In order to revise such final decision, however, where it involves the decision of an issue of fact, a statement, in the form of a bill of exceptions, containing the evidence given or facts proved in the trial of such issue, must be prepared and signed by the judge of the circuit court, and made a part of the record of the case. The appeal in such case must be taken by serving and filing the notice of appeal within six months from the entry of such decision, and by perfecting it, as in other cases of appeal to the supreme court.

THE PRESENTMENT OF A CLAIM TO AN ASSIGNEE in proceedings of the character above referred to requires more than the mere demand of a sum of money; a statement under oath of the debt or liability which is alleged to exist against the insolvent debtor should be made out and delivered or transmitted to the assignee, and should specify sufficient facts to apprise the parties interested in the estate of the nature and consideration of the debt.

A STATEMENT OF THE MERE EVIDENCE of the debt, such as a promissory note, is not sufficient, as "a note at best is but presumptive evidence of a debt."

APPEAL from Multnomah County.

X. N. Steeves, for Appellant.

R. & E. B. Williams and Strode & Beach, for Respondent.

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THAYER, C. J.—This appeal is from a decision of the circuit court for the county of Multnomah. It was brought here some time ago, and after being argued and submitted, an opinion was filed therein, but the case was not fully determined, in consequence of the transcript being defective. Said opinion is published in 16 Oregon, commencing at page 487, and contains a statement of the facts in question. Since the opinion was rendered, and in pursuance of a suggestion contained therein, the appellant's counsel has had a copy of the order or decision of the circuit court, which is set out in the notice of appeal as made on the twenty-eighth day of June, 1888, certified here, and the case is now in a condition for final disposition. The decision referred to is to the effect that the petition of the appellant, S. Mitchell, be denied, and his claim and that of S. H. Abrahams be adjudged not to have been properly exhibited or presented to the assignee, and they be disallowed for that reason. This was clearly a final decision, within the meaning of the constitution, which confers jurisdiction upon this court to revise the final decisions of the circuit courts in all cases. I do not think, however, that the other orders or decisions of the circuit court specified in the notice of appeal can be regarded as final decisions, as they all relate to intermediate matters in the proceeding. And if they were final orders, it would avail the appellant nothing on this appeal, as more than six months expired after they were made and entered before the appeal was taken.

The notice of appeal was served and filed on the nineteenth day of September, 1888, and the orders were all entered on and prior to the twenty-first day of March, 1887,—nearly a year and a half before the appeal was attempted to be taken. Nor can said orders be deemed "judgments or decrees" for the purpose of being reviewed, as provided in section 535 of the code, for the reasons,

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—1. That said section only applies to judgments and decrees *eo nomine*; and 2. An order, to be deemed a judgment or decree within the meaning of that section, must be an order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein. The only question, therefore, which this court can properly consider is, whether or not the order and decision of the circuit court made on the twenty-eighth day of June, 1888, was erroneous.

It appears that the appellant, Mitchell, on the twenty-fifth day of May, 1888, filed his petition in said court, in which he set out a statement of facts alleged to have occurred in the said insolvency proceedings; that he alleged therein, among other allegations, that after the expiration of the said three months,—referring to the three months from the time of first publishing notice, at the expiration of which the assignee is required to report and file with the clerk of the court a true and full list, under oath of all such creditors of the assignor as shall have claims, etc., as provided in section 3178, Code of Miscellaneous Laws,—and on the tenth day of January, 1888, the said Ira F. Powers, as assignee, filed in said court what purported to be his first report, and thereby reported to the court all claims presented as such against said estate, save and except the said claims of the petitioner, W. Friedlander and S. H. Abrahams, but thereafter, and on the twenty-eighth day of January, 1888, pursuant to an order of the court, he filed and reported those claims; that thereafter, after the full period of three months more had expired, and on the eighteenth day of May, 1888, the said Powers, as such assignee, filed his final report, so called, in said court, but that said report is incomplete and false in this, viz., that it does not report either or any of said claims of the petitioner, Abrahams or Friedlander, but falsely reports a number of other claims, aggregating about

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\$2,382, as the only claims ever presented to said assignee or entitled to share in the dividends of said estate; that said Powers has submitted his said report to the court, and asks an order of distribution of said estate of the assets thereof to said other creditors, which, if made as asked, will entirely consume such assets to the irreparable injury of petitioner and said other alleged creditors; that no order of distribution had been made, and that none of said claims had ever been adjudicated by the court nor disallowed, but were entitled to a share in such dividends; that petitioner had no plain, speedy, or adequate remedy at law.

A prayer was appended to the petition asking an order and judgment of the court as follows: 1. Allowing said claims; 2. That said Powers pay on each of said claims an equal *pro rata* dividend, with all other claims against said estate; 3. That said final account of said Powers be not allowed, nor any settlement of the estate be made until after hearing the petition; 4. For such other and further relief as might be just and equitable; 5. For costs and disbursements.

Upon this petition, the said circuit court granted an order, the substance of which is as follows: "Now, at this time, upon the reading of the petition of S. Mitchell herein this day filed, it is ordered by the court that Ira F. Powers appear and answer the petition aforesaid, within five days from the service of this order upon him, and show cause, if any exist, why the prayer of said petition shall not be granted as asked."

Thereafter, and on the first day of May, 1888, the said assignee, Ira F. Powers, in pursuance of said order, filed an answer to the said petition, in which he positively denied that said petitioner at any time presented any claim to him against said estate; denied that said petitioner Friedlander or Abrahams had any claim for any sum

against said insolvent or against his estate; denied that the claims of either of said parties were entitled to a share in the distribution of the assets of said estate; denied that on the twenty-eighth day of January, 1888, or at any other time, the assignee filed or reported to said court the said or any claims of said parties, or either of them, and denied substantially all the other allegations contained in the said petition.

How the issue of fact thus formed between the petitioner and the assignee was disposed of is not known; all we have before us is the order and decision made by the said circuit court on the twenty-eighth day of June, 1888, from which the appeal is taken.

There is, among the papers sent here, another answer of the assignee, which appears to have been filed on the twenty-eighth day of January, 1888, and from which it might be inferred that the claims in question were presented to him; but whether it was introduced in evidence before the court on the trial of said issue of fact, or was introduced or explained away by other evidence, or whether any evidence whatever was introduced in regard to the matter, does not appear.

The adjudication of the court that the claims had not been properly exhibited or presented to the assignee involved both questions of fact and law, and if it committed error in that particular, it should be corrected. But how we are to ascertain whether or not the court did commit error in the adjudication referred to, without some statement, as provided by rule 14 of this court, commented upon in the former opinion, is beyond my power of comprehension. We cannot, as we are frequently reminded from the bar, presume error; but it must affirmatively appear.

The appellant's counsel, instead of making up a statement of the facts occurring in the case, and having it

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authenticated by the circuit judge, as provided by said rule 14, has brought here a mass of papers for us to study out and draw conclusions from. Such a course of practice leaves questions of importance in uncertainty and doubt. Oral proofs, if any such have been made, are necessarily excluded, and written evidence which does not constitute a part of the record is unavailing in this court. Both, however, may be authenticated in the manner pointed out by said rule, and thereby be rendered competent. The appellant's counsel should, after the assignee filed his answer denying the presentment of the claims, have submitted his proof of the fact. It was alleged in the petition and denied in the answer, and the counsel then had a right to introduce evidence to prove it. If the counsel did that, and the court decided against him upon the proof so made, he should have prepared a statement of the evidence given or facts proved, in the form of a bill of exceptions, and this court would then be in a condition to determine whether or not the proofs established as a matter of law the fact that the claims had been presented. But as the matter stands, it presents a mere assertion, affirmed by one party and denied by the other, and this court has no means of determining which is in the right. The presentment of a claim in such a case requires more than a mere demand of a sum of money. A statement under oath of the debt or liability which is alleged to exist against the insolvent debtor should be made out and delivered or transmitted to the assignee. The creditor may not be required to state all the facts out of which the debt arose as fully as in a case of a confession of judgment; but he should set out sufficient facts to apprise the parties interested in the estate of the nature and consideration of the debt. If the debt is for money loaned or advanced, or goods sold, it should be stated, and the statement should not be lim-

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ited to a specification of the evidence of it. Persons interested in an insolvent's estate have a right to know something more than the fact that the insolvent executed to the claimant his promissory note of a certain date; they should be informed with reasonable certainty what the consideration of the claim was.

"A note," as said by Gardner, C. J., in *Chappel v. Chappel*, 12 N. Y. 218, 219, 64 Am. Dec. 496, "at best, even between the parties to the instrument, is but presumptive evidence of a debt. The maker did not become indebted by the mere execution of a written promise to pay money. His obligation arose out of facts *dehors* the instrument, and antecedent to or accompanying its execution. In this case," said the learned judge, "we are informed, by the affidavit read in opposition to the motion, that there was a loan of money. The loan, if the fact is so, created the obligation; and the note was given as presumptive evidence of the debt, and as a means of enforcing its payment. The statute, however, looks not to the evidence of the demand, but to the facts in which it originated; in other words, to the consideration which sustains the promise."

To the same effect is *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Rep. 406.

These were cases, it is true, in which the sufficiency of a statement of confession of judgment came in question under a statute which required the confession to state plainly and concisely the facts out of which the indebtedness arose, and to show that the sum confessed therefor was justly due or to become due. But, at the same time, the rule of construction in that class of cases has a bearing on the construction to be given in the case under consideration.

The object of the requirement to state the facts out of which the indebtedness arose, in cases of confession of

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judgment, was to prevent fraud upon creditors; and it is just as essential that some reasonable course be pursued in the presentment of claims against the estate of an insolvent, which has in view a like purpose.

The act relating to assignments for the benefit of creditors does not provide in express terms that the creditor shall state the facts out of which the claim arises which he presents to the assignee; he is only required, as before mentioned, to present it under oath; but I think it may be inferred from the fact that he is required to specify the facts out of which the claim arose, as the assignee is required by section 3178 of the Code of Miscellaneous Laws to file with the clerk of the court a true and full list of all such creditors of the assignor "as shall have claims to be such," with a statement of their claims, etc. The assignee certainly should not be required to file a *statement* of the claims of the creditors without their being required to furnish him a statement of them.

Again, by section 3179 of the code, any person interested is allowed to appear and file any exceptions to the claim or demand of any creditor which constitutes an issue of fact triable by jury, and upon which a judgment may be rendered. The presentment of a claim by a creditor against the estate of an insolvent debtor is, it seems to me, so important a matter that it should be presumed that the legislature intended to require the claimant to set out in a statement the consideration of the claim. Such a requirement will have a tendency to prevent debtors in failing circumstances from executing to their confidential friends promissory notes on account of some pretended indebtedness,—a practice which should not receive any sanction from courts of justice. If the claimant is compelled to state what the claim is for, instead of the evidence of it, there will be greater hesitancy in resorting to such schemes, and a better opportunity afforded

Points decided.

to other creditors to expose the dishonesty and nefariousness of such machinations.

Under the views herein expressed, this court has no authority to revise any of the decisions of the circuit court mentioned and referred to in the notice of appeal.

The appeal must therefore be dismissed, and the decision appealed from affirmed.

[Filed May 3, 1889.]

HOUSTON, APPELLANT, v. TIMMERMAN, RESPONDENT.

LIS PENDENS — WHAT FOUNDED UPON. — Strictly speaking, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity.

ID. — OBJECT AND PURPOSE OF DOCTRINE OF. — The purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgment or decree.

ID. — SUBJECT-MATTER OF SUIT. — The general rule is, that one who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction, is bound by the judgment or decree, whether he purchased for a valuable consideration or not, or without any express or implied notice in point of fact.

ID. — WHAT ESSENTIAL TO. — Two things seem indispensable to give effect to the doctrine of *lis pendens*: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.

DIVORCE — EFFECT OF DECREE IN SUIT FOR. — In a divorce suit, the real property which comes to the wife as a result of the divorce is not the subject-matter of the litigation. The court has no jurisdiction to affect or divest the title of the husband to lands owned by him, or to decree one third of them to the wife, independent of a decree for divorce. Nor has the plaintiff any title upon which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for a divorce.

DIVORCE SUIT — ALIMONY PENDING. — Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact,

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and cannot be divested during the pendency of the litigation, but only when a decree has been rendered that the marriage is dissolved.

Id. — WHAT DECREE MUST STATE. — It is "whenever a marriage shall be declared dissolved" that the statute operates, — not before, or *pendente lite*, — and the court is then authorized and it becomes its "duty" "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce.

Id. — REAL PROPERTY OF PARTIES, WHEN AFFECTED BY. — While the prosecution of a divorce suit might terminate in a decree which would affect, as a result thereof, the property of the defendant, such real property is not the specific subject of the controversy, and by reason thereof is not withdrawn from such burdens as may be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree for a divorce.

Id. — It results that a purchaser of such lands at an execution sale upon such judgment is not affected by or subject to the rule of *lis pendens*.

DECREE IN DIVORCE CASES — EFFECT OF ON REAL ESTATE OF PARTY IN THE WRONG. — While, since the decision in *Bamford v. Bamford*, 4 Or. 30, it has been deemed essential, to reach the property of the guilty party, that such property should be described in the complaint and decree, yet it is doubtful whether any such allegation is necessary, but that it is a sufficient compliance with the last clause of section 498, Oregon Code, to say, in effect, that the party obtaining the divorce is thereby entitled to one third of the real property owned by the other.

Id. — In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purpose between the parties interested much better than in a divorce suit, in which it is neither convenient nor proper that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding.

APPEAL from Linn County.

Hewitt & Bryant and Filmon Ford, for Appellant.

J. K. Weatherford and *D. B. N. Blackburn*, for Respondent.

LORD, J. — This was a suit to partition certain lands described herein.

The defendant denied that the respondent had any interest in said lands, and alleged that she was the owner in fee-simple and entitled to the possession of the whole

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of said premises. The plaintiff, in reply, denied this, and alleged affirmatively that, some time in July, 1884, she commenced a suit against A. J. Houston for a divorce and alimony, and for an equal undivided one third of the real property then owned by said Houston, and that he was the owner in fee of said real property which was duly described therein; that the summons in said divorce suit was served on 1884, and that, prior to that time, and prior to the twenty-sixth day of September, 1884, the defendant Timmerman had notice that the complaint for divorce and one third of said real property had been filed by the plaintiff against her husband; that on the fifth day of February, 1886, a decree was entered granting a divorce in favor of the plaintiff, and adjudging her to be the owner of the undivided one third of said real property, etc.

The court below, after a trial of said cause, rendered a decree therein, granting the prayer of plaintiff for partition, except as to the 160 acres of land mentioned therein, and partition was ordered and made on June 26, 1888, and confirmed by the court.

The defendant Timmerman derived her title to the premises in dispute in this wise: "On the fifteenth day of March, 1880, the plaintiff's husband, A. J. Houston, for value, made and delivered his promissory note to the defendant Timmerman for the sum of \$3,400, with interest at the rate of ten per cent per annum from date; that the said A. J. Houston failing to pay said note, the defendant, Timmerman, commenced suit on the twenty-sixth day of September, 1884, and caused service of summons to be made upon him on that day; and that on October 27, 1884, the defendant, Timmerman, recovered judgment against the said A. J. Houston for the sum of \$5,463.87, which, on the same day, was duly docketed in the judgment lien docket, and thereupon became a lien upon all

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the real property mentioned in the complaint in this suit. It further appears that on March 19, 1883, said A. J. Houston made and delivered his promissory note to J. T. Williams for one thousand dollars, with interest from date at the rate of ten per cent per annum, payable six months after date, and to secure the payment of the same, executed a mortgage, which was duly recorded, upon the 160 acres of land set out in the complaint. The said Houston failing to pay said note, the mortgage was foreclosed against the said Houston and the plaintiff herein. The defendant Timmerman, however, answered, setting up her judgment, and asked, if the property be sold to foreclose said mortgage, that the overplus, if any, should be applied in payment of her judgment, and a decree was accordingly so entered, etc. That execution was issued upon said decree, and said 160 acres was sold to the defendant Timmerman for \$2,500; that thereafter, on May 13, 1885, execution was issued upon said judgment, and the remainder of the premises described herein was sold to the defendant Timmerman, and said sale confirmed, and deeds were fully executed by the sheriff to said defendant.

It will be noticed that the suit of the defendant Timmerman to recover the amount due on the note against A. J. Houston, who was then the husband of the plaintiff herein, was commenced after the suit of the plaintiff for divorce against her husband, and that a judgment was recovered and docketed before a decree in the divorce suit was rendered, and in which one third of the real estate then owned by the husband was decreed the plaintiff. It is true, there was no direct proof of the date of the service of the summons in the divorce suit, but as this will not affect the result reached, it is immaterial. The contention is, that the defendant Timmerman was a purchaser *pendente lite*. There is, however, a preliminary question to be first disposed of, namely, that the appeal

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was not taken within six months, as allowed by law. The answer to this is, that the objection relates to the interlocutory or first decree, and not to the final decree, and that, as our own code does not authorize an appeal from interlocutory judgments or decrees, but only from such as are final, and the appeal from the final decree being within six months, there was a right of appeal, and the objection, therefore, is unavailing.

An examination of the statutes of the two states from which the authorities were read, to the effect that an appeal might be taken before a final judgment or decree was entered, show that appeals in those states may be taken from interlocutory judgments or decrees, which not being the case under our code, they fail on application. (See Freeman on Partition, secs. 519, 527.)

But to return: among the ordinances of rules adopted by Lord-Chancellor Bacon "for the better and more regular administration of justice" was one which provided that where a person "comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance, or privity of the court, there regularly the decree bindeth." Chancellor Kent said that a "*lis pendens* duly prosecuted, and not conclusive, is notice to a purchaser so as to affect and bind his interest by the decree." Strictly speaking, however, the *doctrine of lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. "It affects him," said Lord-Chancellor Cranworth, "not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party. . . . The necessities of mankind require that the decision of the court shall be binding, not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees

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had or had not notice pending proceedings. If this were not so, there could be no certainty that litigation would ever come to an end." (*Bellamy v. Sabine*, 1 De Gex & J. 566.) The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered, otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgments or decrees. Hence the general proposition that one who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact, is sustained by many authorities, and disputed by none. (*Eyster v. Gaff*, 91 U. S. 521; *Grant v. Bennett*, 96 Ill. 513; *Randall v. Lowe*, 98 Ind. 261; *Daniels v. Henderson*, 49 Cal. 242; *Blanchard v. Ware*, 43 Iowa, 530; *Carr v. Lewis*, 15 Mo. App. 551; *Currie v. Fowler*, 5 J. J. Marsh. 145; *Hiern v. Mill*, 13 Ves. 120; 1 Story's Eq. Jur., sec. 405.)

The doctrine of *lis pendens* was introduced in analogy to the rule at common law in a real action, "where, if the defendant alien after pendency of the writ, the judgment in the action will overreach such alienation." (*Sorrie v. Carpenter*, 2 P. Wms. 482.) And this may account for the leaning in some of the courts to restrict the application of the rule of *lis pendens* to actions or suits affecting title to real property. (*McLaurine v. Munroe*, 30 Mo. 469; *Winston v. Westfelt*, 22 Ala. 760; 58 Am. Dec. 278; *Baldwin v. Love*, 2 J. J. Marsh. 489; *Murray v. Settleburn*, 2 Johns.Ch. 441.) But it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels. Two things, however, seem indispensable to give it effect: 1. That the litigation must be about

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some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit "must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril." (Freeman on Judgments, secs. 196, 197.)

Now, the divorce suit of the plaintiff was not brought specifically to recover the one third of the real estate of her husband, as was decreed in the divorce proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce proceeding. The court has no jurisdiction to affect the title of the husband to his lands, or decree that one third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce.

A proceeding in divorce is partly *in personam* and partly *in rem*; and in so far as it is to affect the marriage status, it is to change a thing independent of the parties, and is a proceeding, not against the parties *in personam*, but against their status *in rem*. (Am. & Eng. Ency. of Law, tit. Divorce, 751.) The matter upon which the jurisdiction acts is the status; the marriage is the thing which the suit is brought to dissolve,—it is the subject of the litigation,—but as incidental to it, the court may grant temporary alimony *pendente lite*, or permanent alimony when a decree for divorce is rendered. And the general rule is, that bills for alimony do not bind the property of the defendant with *his pendens*. (1 Story's Eq. Jur., sec. 196; *Brightman v. Brightman*, 1 R. S. 112; *Isler v. Brown*, 66 N. C. 556; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781.)

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But the court cannot affect the title of the real property of the defendant in a divorce proceeding until the point is reached that a decree of divorce is to be rendered. Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for a divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute.

Our statute provides: "*Whenever* a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her undivided right in fee of the whole of the real estate *owned* by the other *at the time of such decree*; and it . . . shall be the duty of the court to enter a decree in accordance with this provision." (Code, sec. 499.)

It is "whenever a marriage shall be declared dissolved" that the statute operates,—not before, or *pendente lite*,—and the court then becomes authorized and it is its "duty" "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "*owned* by the defendant *at the time of such decree*" for a divorce.

It must be manifest, then, that the primary object of the suit is to affect the marriage relation,—its *status*,—that it is the specific matter in controversy to be affected, and that it is only when the *status* is changed by a decree of divorce that the statute operates to divest title "*owned*" by the defendants, and that it then becomes the duty of the court to enter a decree in accordance with its provisions. Nor do the cases cited by counsel sustain his contention. In *Folerton v. Willard*, 30 Ohio St. 586, the suit was of "double aspect," as said by the court, and was brought to protect her equitable right in property, which was the subject of dispute. This property was bought

with the wife's money, and she sought a restoration of her rights. The court says: "It is evident that the court, in coming to its conclusion, did take these equities into consideration, so that the decree may fairly be considered an equitable one in her favor." And again: "In a proceeding like the one under consideration, where the wife claims rights in her husband's property other than those arising from the marital relation, and insists upon them in connection with her claim for alimony, the court is fully authorized to pass upon them." In *Daniel v. Hodges*, 87 N. C. 97, the proceeding was for alimony, and the only property which the husband owned was a lot that the wife sought to have subjected to her claim, and was in actual possession of it by order of the court, when her husband, pending the litigation, conveyed it to another, and the court held, under the exceptional circumstances of the case, that the doctrine of *lis pendens* applied. There the proceeding was to subject the specific thing to her claim, which the husband attempted to defeat by conveying away the property, and the court, while admitting the general doctrine that a *lis pendens* was not applicable in such cases, said: "We are of the opinion the petition for alimony, under the *particular* circumstances of the case, constituted such a *lis pendens* as affected the purchaser with notice, independent of the actual notice had," and rendered the deeds void. But this has no relevancy to the case at bar. There she sought to subject the property to her claim for alimony, and the suit was directed specifically against it, and she was put in actual possession by order of the court; and then it was only "under the peculiar circumstances of the case" that the court thought the purchaser from the husband pending the litigation was affected with the rule of *lis pendens*. Here there was no alienation of the property, which was only incidentally involved or any charge of any act on the

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part of the defendant Houston, to defeat any right whatever which might accrue to the plaintiff, if the marriage should be dissolved. If the defendant Houston had conveyed away the property to another with the object of defeating her right, upon a decree for divorce, to any interest in his lands, such purchaser may be affected with the rule of *lis pendens* in such case; but that is not the question here, and which it will be time enough to decide when properly presented for our consideration. The debt which the defendant Houston owed the defendant Timmerman was contracted long before the suit for divorce was commenced, or the cause or ground of the divorce existed, and doubtless the credit was given on the faith of the property, a part of which included the property in dispute, then owned by Houston. There is no pretense of any fraud or collusion, or that the debt is not an honest obligation which Houston ought to have paid long before the divorce proceeding was instituted. Although the commencement of the divorce suit might result in a decree which would affect the property of the defendant, the property was not the subject specifically of the litigation, and by reason thereof was not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree. The defendant Timmerman had the legal right to commence her action to recover the money due on the note of Houston, and the fact that the wife of Houston had instituted proceedings for a divorce did not affect that right, but when judgment was recovered thereon and docketed by force of law, the lands then owned by him in that county, including the land in dispute, became subject to the lien of such judgment; and as the facts show that this was before any decree was rendered in the divorce whereby title to such lands could

Opinion of the Court — Lord, J.

be divested, it follows that whoever took title from him subsequently, either by contract or by operation of law, took said title *cum onere*, or subject to the lien of such judgment. It results, as a purchaser of said lands at an execution sale upon such judgment, the defendant Timmerman was not affected by or subject to the rule of *lis pendens*, and her deed thereby rendered invalid. It is true, in the divorce suit, the property was described in the complaint and decree, which, since the decision in *Bamford v. Bamford*, 4 Or. 30, has been deemed essential to reach the property of the guilty party, but it is apprehended that neither allegation or proof concerning the lands is necessary, but that it is enough and a sufficient compliance with the latter clause of section 499 of the Oregon code to say, in effect, that the party obtaining the divorce is hereby entitled to one third of the real property owned by the other, whatever it may be. In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purpose between the parties interested much better than in a divorce suit, in which it is neither proper nor convenient that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding. (*Barrett v. Failing*, 6 Saw. 475.) So that, however we look at the facts of this record, our conclusion is that the decree of the lower court must be reversed, and it is so ordered.

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[Filed May 3, 1889.]

P. W. PARKER, RESPONDENT, v. THE WEST COAST
PACKING CO., APPELLANT.

AN OWNER OF LAND BOUNDED BY NAVIGABLE WATERS possesses important riparian rights. By virtue of such ownership, he is entitled to build wharves out to such a depth of water as will enable ships and vessels navigating it to touch at such wharves and receive and discharge freight, and has the right to use the shore in front of his land for any purpose not inconsistent with the rights of the public. He may reserve such right to himself when he conveys away the land above high-water mark to which it pertains, or grant it to others to enjoy. Such right, however, is a mere incorporeal hereditament, and the possession of it cannot be recovered from a usurper by an action in the nature of an ejectment. Where S., therefore, who owned a donation land claim, bounded by high-water mark, on the tide-waters of the Columbia River, laid off a block in front of his claim extending beyond low-water mark, and sold lots therein to the defendant, but reserved in the deed of conveyance all the hereditaments, franchises, and wharfing privileges, fronting on the north of the northern boundary line thereof, which hereditaments, appurtenances, etc., he subsequently granted to the plaintiff, and the defendant, disregarding said reservation, built and erected structures in the navigable waters of the river in front of the northern boundary line of the lots purchased: *held*, that the plaintiff had no such tangible interest in the land and water where the structures were situated as would enable him to recover it in an action for the recovery of the possession of real property.

APPEAL from the Circuit Court for the county of Clatsop.

Fulton Brothers, for Appellant.

J. Q. A. Bowlby, for Respondent.

The respondent commenced an action in said circuit court against the appellant, a private corporation, ostensibly to recover the possession of real property. He alleged in his complaint that he was the owner in fee and entitled to the immediate possession of all the tide-land, water frontage, wharfing rights and privileges, north of, in front of, and adjacent to the north line of lots 4, 5,

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and 6, in block 149, of the town of Astoria, as laid out and recorded by J. M. Shiveley, in Clatsop County, Oregon. Said tide-land, water frontage, wharfing rights and privileges, being bounded on the north by the ship's channel of the Columbia River; that the north line of said lots 4, 5, and 6 is parallel to and three hundred feet north of the north line of Hemlock Street, in said town of Astoria; that more than six years ago, appellant wrongfully, and against the consent of respondent, entered into the possession of said premises, and wrongfully withholds them from respondent. The appellant filed an answer to the said complaint, denying the respondent's ownership of the premises therein described; denied that there was any tide-land whatever north of, in front of, or adjacent to the north line of said lots 4, 5, and 6, or either or any part thereof; denied that the north line of said lots was only three hundred feet north of the north line of said Hemlock Street, but alleged that it was in the ship's channel of the Columbia River; denied the wrongful entry, possession, and withholding of the premises. The appellant, for a further answer, alleged that the south line of lots 4, 5, and 6 was north of and beyond the line of extreme low tide in said river; that all the land lying between ordinary high and low tide line of said river, at said point, was between the south and north lines of lots 7, 8, and 9 of said block 149, and appellant, during all the time alleged in the complaint, was the owner in fee-simple of lots 4, 5, 6, 7, 8, and 9, and in possession thereof, occupying the same for a salmon cannery; and being such owner of said lots, it had the right and did extend its wharf out beyond the north line thereof, into said channel of said river, to enable boats to land thereat. The respondent filed a reply denying the new matter, except as to the appellant's ownership of said lots, which ownership he tacitly admitted. The parties to the action having waived a jury

Statement of Facts.

trial, the case was tried before the court without a jury, and the following conclusions found: 1. That respondent is the owner of the wharfing rights and privileges north of, in front of, and adjacent to the north line of lots 4, 5, and 6, in block 149, of the town of Astoria, as laid out and recorded by J. M. Shiveley, in Clatsop County, Oregon, and that said wharfing rights and privileges extend to the ship's channel of the Columbia River; 2. That respondent is entitled to the immediate possession of the same, and that appellant wrongfully withholds the same from respondent; 3. That respondent is damaged by such wrongful withholding, in the sum of twenty-five dollars. Upon which conclusions the said court adjudged that the respondent have judgment against the appellant for the possession of the wharfing rights and privileges, and land covered with water, between the north line of said lots 4, 5, and 6, and the south side of the ship's channel of the Columbia River on the north, and for costs and disbursements, and said sum of twenty-five dollars, from which judgment said appeal is taken. It appears from the plats of the said town of Astoria, which is and has been for several years an incorporated city, that said block 149, as indicated thereon, is situated between Hemlock Street on the south, East Eighth Street on the east, East Seventh Street on the west, and a line parallel on the north line of Hemlock Street and three hundred feet north thereof on the north; that the block consists of twelve lots, numbered consecutively from one to six, in the north half of the block, and from seven to twelve in the south half thereof, the northeast lot being No. 1, and the southeast lot being No. 12; and the bill of exceptions shows that nearly the entire block is below high-water mark on the Columbia River, and about half of it below low-water mark. The counsel for the respective parties admitted on the hearing that at the north

Statement of Facts.

line of lots 7, 8, and 9, and the south line of lots 4, 5, and 6, the water was two feet and six inches in depth at low tide; and eight feet and six inches in depth at high tide; and that at the north line of said lots 4, 5, and 6,—the north line of the block,—the water at low tide was six feet in depth, and at high tide, twelve feet in depth. It also appears from the bill of exceptions that the portion of the block above high-water mark is a part of the donation land-claim of John M. Shiveley, who platted the said block, and a number of other blocks similarly situated, and duly recorded such plat. It appeared, also, that the board of commissioners of the state of Oregon for the sale of school and university lands, on the twenty-eight day of September, 1876, executed to the said John M. Shiveley a deed in the name of the state conveying to him, among other tide-lands, all the tide-land embraced in said block No. 149, and extending to the centers of the streets east and west thereof. It further appeared that on the seventh day of August, 1879, the said J. M. Shiveley and Susan L. Shiveley, his wife, R. Cyrus Shiveley, and Milton Elliott duly executed a deed to one A. W. Cone, whereby they conveyed to the said Cone all their right, title, and interest in and to lot 7, in said block 149; that said deed contained the following clause: "And it is hereby stipulated and agreed by and between the said John M. Shiveley and A. W. Cone that all the hereditaments, appurtenances, franchises, and wharfing privileges fronting on the north of the northern boundary line of said lot 7 are expressly reserved out of this conveyance." And it further appears that said Shiveley and wife, on the twenty-third day of October, 1879, executed a deed to August Olsen, purporting to convey to him lots Nos. 8 and 9, in said block 149, which deed contained a like clause of reservation as that in the former one. It further appears that on the thirtieth day of October, 1879, the said Shiveley and wife ex-

Opinion of the Court—Thayer, C. J.

ecuted a deed to the appellant, conveying to it their right, title, and interest in lots Nos. 4, 5, and 6, in said block 149, which also contained a like clause of reservation. It further appeared in evidence that the said Shiveley, on the twenty-fourth day of September, 1887, executed to the respondent a deed purporting to convey to him lots 1, 2, and 8, in said block 149, together with all the tide-land, water frontage, wharfing rights or privileges, in front of said lots, and northerly thereof to the ship's channel of Columbia River; and also all the tide-land, water frontage, wharfing rights or privileges, in front of said lots 4, 5, and 6, in said block 149, northerly thereof to said channel of said river. It was admitted by the respondent, at the trial in the circuit court, that said lots 7, 8, and 9, described in the deed to Cone and Olsen, were subsequently conveyed by them to the appellant, and that the appellant owned all of said lots 4, 5, 6, 7, 8, and 9 in said block 149, and which constitutes the west half thereof.

THAYER, C. J.—It will be observed from the facts in this case that John M. Shiveley, the owner of a donation land claim in the town of Astoria, fronting northerly on the Columbia River, claimed all the land and water in front of him out to what is termed the ship's channel; that he attempted to lay off such frontage into blocks, lots, and streets, recorded a plat thereof, and executed deeds of conveyance of portions of it to divers parties, who claimed ownership thereof by virtue of such conveyances; that in the several deeds to the lots in the west half of said block 149,—consisting of lots 4, 5, 6, 7, 8, and 9,—he inserted a sort of stipulation reserving to himself all rights and franchises in front thereof to ship's channel, which pretended rights and franchises he subsequently undertook to convey to the respondent in this case; and that, by virtue of such conveyance, the latter claims the

title thereto which he is attempting to assert herein; that Shiveley, in order, I suppose, to strengthen his title to such frontage, rights, and franchises, obtained a deed from the state of Oregon to all or a large part of the tidelands in front of his donation claim.

The appellant, it seems, after procuring the deeds from Shiveley and his grantees to the several lots referred to, did not observe the stipulation of reservation contained therein, but extended out a wharf of some kind "to ship's channel," and assumes to occupy it in defiance of the claim of Shiveley's grantees, who now attempt to eject him therefrom.

This condition of affairs presents two questions: 1. Whether an action to recover the possession of real property can be maintained in such case; and 2. Whether Shiveley had such a tangible property right in the said frontage as enabled him to sell it out in parcels, and the purchasers thereof to acquire distinct interests therein.

That an owner of land bounded by navigable waters possesses important riparian rights by virtue of such ownership is not open to question. (*Yates v. Milwaukee*, 10 Wall. 497.) He has the privilege of building a wharf out to such a depth of water as will enable ships or vessels to touch thereat and receive or discharge freight, and may apply such frontage to any use not inconsistent with the rights of the public. He may reserve the rights to himself when he conveys away the land above high-water mark to which they pertain, or he may grant them to others to enjoy, but in subordination to the public right of navigation. Such rights, however, are mere incorporeal hereditaments. The land below high-water mark upon a navigable river, and which constitutes a part of its bed, belongs to the state in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The state, however, cannot sell it,

Opinion of the Court — Thayer, C. J

nor can the state control its use, except to increase the facilities for navigation and commerce. Nor can the riparian proprietor grant such land, or any right thereto, except such right as he himself is entitled to enjoy. He can only grant the franchise as before suggested. When, therefore, Shively and wife executed the deed to the appellant of October 30, 1879, conveying to appellant their right title and interest in said lots 4, 5, and 6, they merely granted to him a part of the riparian rights which attached to the donation land claim of John M. Shiveley. The deed, whatever its form or description of premises contained therein, only operated as a grant of a right to erect structures in the interest of navigation, and if it limited such right to an enjoyment of the portion of frontage described therein by force of said stipulation of reservation, yet Shiveley did not thereby acquire any more tangible interest in the land and water north thereof than he had before, which was not sufficient to enable him or his grantee to recover it in an action in the form of the one brought. An action in the nature of ejectment will not lie to recover possession of an incorporeal thing, as no possession can be given of such species of property.

If the respondent, therefore, has a right to erect wharves or other structures in the interest of navigation north of said lots 4, 5, and 6, and the appellant has infringed upon the right, he must seek some other mode of redress. Whether he has such right, however, it not necessary for us to decide in this case; but even if he has, he certainly cannot recover it in an action to recover the possession of real property, and that is decisive against his right of action, and no other question need be considered.

The judgment appealed from must be reversed, and the case remanded to the circuit court, with directions to dismiss the complaint.

Opinion of the Court—Lord, J.

[Filed May 3, 1889.]

GOODYEAR, RESPONDENT, v. SCHOOL DISTRICT
No. 5, APPELLANT.

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17 522
21* 664
21* 665

TEACHER—CONTRACT FOR COMPENSATION OF—SCHOOL—SUSPENSION OF—
FOR WHAT REASON MAY BE DONE.—Where under a contract between the directors of a school district there was a clause to teach a definite period unless the school was discontinued by order of the directors, and the directors, in consequence of the prevalence of diphtheria, stopped the schools, but reopened them when the danger had passed, and before the expiration of such contract: *held*, that the discontinuance of the school was for good cause, and authorized under the contract, but that it did not operate to annul such contract and discharge the teacher, but that it did relieve the district from liability during such period, but not from liability for the unexpired portion of such contract after the schools were reopened.

APPEAL from Jackson County.

A. S. Hammond, for Respondent.

H. K. Hanna and *E. De Peatt*, for Appellant.

LORD, J.—This was an action to recover money on a written contract for services as a teacher. The contract was as follows:—

“It is hereby agreed between the directors of School District No. 5, Jackson County, state of Oregon, and Amanda Goodyear, a qualified teacher of said county and state, that the said Amanda Goodyear is to teach in the public school of said district for the term of nine months, unless discontinued by order of the directors, for the sum of forty-five dollars (\$45) per month, commencing on the fifth day of September, A. D. 1887; and for such services lawfully rendered, the directors of said district are to pay the said Amanda Goodyear the amount that may be lawfully due according to this contract, on or before the first day of June, A. D. 1887. Dated this fifth day of September, A. D. 1887.

[Signed]

“F. ROPER,
“J. H. CHITWOOD, } Directors.
“E. S. APPLEGATE, }
“AMANDA GOODYEAR, Teacher.”

Opinion of the Court — Lord, J.

In December of the same year, diphtheria appeared in the district, and among the children of the school, and in consequence thereof the directors discontinued the schools of the district, and discharged the teachers during such discontinuance on that account. And on or about the ninth day of January, 1888, the disease or epidemic having disappeared, the directors notified the teachers to resume their schools, and the directors and teachers indorsed on the back of the original agreement that the same should be renewed from and after that date. After the schools had gotten fairly started, the diphtheria reappeared, and on the first day of February, 1888, the directors of said district decided to close the schools indefinitely, and reordereed that the teachers be discharged, all of which was done at a special meeting called for that purpose. Subsequently, the schools of said district were reopened for the spring term, but the plaintiff was not allowed to resume under her contract, and she has brought an action to recover for her services rendered during the time the school which she taught was discontinued on account of the diphtheria, and also for the unexpired portion of her contract, in which the directors refused to allow her to teach, but hired another in her place; at all other times the plaintiff was paid for her services. By this statement of the facts, it will be seen that, under the contract, the directors claimed the right to discontinue the schools for any proper cause, and to discharge the teachers, or at least that the discontinuance operated to discharge the teachers; while the plaintiff claims that her contract was in full force and effect during the whole period covered by it, and that the directors were not authorized under it, although it may have been timely and expedient to close the schools in consequence of the prevalence of the diphtheria, it did not operate to discharge the teachers or to annul the contract.

Opinion of the Court — Lord, J.

In support of the theory of the plaintiff, two cases are cited, viz., *Dewy v. Union School District*, 43 Mich. 481, and *Tripp v. School District No. 7*, 50 Wis. 653.

But this is a mistake. In the first case, the contract was absolute, without any right being reserved by the directors to discontinue the school for any cause. The small-pox broke out and the school was closed, and the court held that this was not *actus Dei* in the sense as would excuse a school district from liability on its contract, and say: "It must appear from observance of the contract by the district was caused to be impossible by the act of God. It is enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the school."

It is apparent from what follows, that if the contract in that case was provided for a discontinuance as in the case at bar, the appearance of an epidemic, such as the small-pox or diphtheria, would have constituted a lawful reason, within the purview of the contract, to have authorized the directors to have discontinued the schools for the time to stay the spread of such diseases, and the suspension of the contract during such discontinuance; or in other words, in such case it would have precluded a recovery for the time the schools were stopped on that account.

The court say: "To let in the defense that the suspense precluded recovery, the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community; and the contract cannot be regarded as tacitly subject to such a condition."

In the case at bar, there is an express provision for a

Opinion of the Court—Lord, J.

discontinuance, to which the parties have agreed, in the event, as we understand it, that it should become necessary, for any proper cause, to stop or discontinue the schools during some period of the contract. That the presence of diphtheria or other contagious and dangerous diseases would be such a cause, or urgent necessity, as would justify the directors, within the sense of the contract, to discontinue the schools until the dangers arising therefrom should pass, in our judgment, is too manifest to be disputed; and, as a consequence, during such discontinuance, there would be no liability to pay or duty to perform the services of a teacher. By the terms of the contract, there is a suspension of it during that period; nor was the plaintiff discharged in consequence thereof, as claimed by the defendant.

In the other case,—*Tripp v. School District, supra*,—there was a clause in the contract by which the directors declared that “we reserve the right to close the school at any time if not satisfactory to us,” and under this contract they acted upon the assumption that they could close the school, and lawfully discharge the teacher before her term of hiring had expired, if they were dissatisfied with her management of the school, although the teacher was competent, and at the time of the discharge was in the due performance of her contract. The court held the power of discharge exercised under this clause to be unauthorized by law, and said: “If the power claimed for the board in this case exists, and may be enforced, then the public schools must be taught to suit the whims, caprices, and peculiar notions of the hiring board, and not as the teacher, in the conscientious discharge of his duty, should teach the same.” And again: “It may, perhaps, be fairly inferred that, under the visitorial powers conferred on the board by section 441, they would have the power to close the school and discharge the teacher if

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he was not, in fact, competent to teach or govern the school, and if for any other cause such teacher was not duly performing the contract on his part, without calling any meeting of the district to take action upon the subject. Such power, however, is very different from that claimed for the board in the case at bar."

Here the board claimed and exercised the power to discharge a teacher, no matter how competent or with what efficiency and usefulness he may have been in the performance of his duties under the contract, if the management was not satisfactory to them, thus usurping powers not conferred, and compelling all teachers of the district to teach to their satisfaction, and not to the satisfaction of the people and the improvement and benefit of the pupils.

In the case at bar, the directors claimed the effect of discontinuing the school during the prevalence of diphtheria operated to discharge the teacher, but not that they had any reserved right under the clause to discharge a teacher who was competent, and in all respects in the faithful and efficient performance of her duties. Their idea was that the suspension of the contract while the school was closed operated to annul or destroy its provisions, and likewise to discharge the teacher and excuse the district from any further liability, and, as a consequence, that the original contract could have no force or effect thereafter unless revived by new promises and engagements. So that there is no parallel between the facts and law as applied in the case cited, and the fact of the case at bar and the law to be applied to it.

What result the court would have reached, if under that clause they had closed the school on account of the presence of some contagious and dangerous epidemic, and the teacher had claimed payment during the whole period covered by the contract, we can only conjecture. There

Opinion of the Court — Lord, J.

is a marked difference in the power exercised under a clause of this character, in an agreement in closing the schools on account of some urgent necessity, and in using the same to dismiss a teacher who is competent and efficient in the discharge of his duties, in consequence of personal dissatisfaction of the directors at the management of the schools.

Under the contract at bar, our own opinion is, that the discontinuances were for good cause, and authorized by the contract, and during such times as there was a suspension of the contract for such causes, it did not operate to annul the contract, or discharge the teacher, but it did excuse or relieve the district from liability during such periods, and that when the danger had passed and the schools were reopened, the teacher—the plaintiff—had a right, under the contract, to resume her duties as teacher for the unexpired portion thereof; and if she held herself in readiness and offered to perform her contract, and the directors refused to allow her to do so, she is entitled to recover according to its terms for that period. The judgment must therefore be modified so as to confine the recovery to the unexpired portion of the contract when the schools were reopened, and it is so ordered that it be entered accordingly, and that neither party recover costs in this court.

DELLA GILROY, RESPONDENT, v. SCHOOL DISTRICT
No. 5, APPELLANT.

LORD, J.—As the facts in this case are identical with those in *Amanda Goodyear v. School District No. 5*, the same judgment will be entered therein.

Opinion of the Court—Lord, J.

[Filed May 3, 1889.]

TRUMAN, HOOKER, & CO., APPELLANT, v. OWENS
AND DEAN, RESPONDENT.

ACCOUNT STATED—WHAT IS.—An account stated is an account which has been rendered by the creditor, and assented to by the debtor as correct, either expressly or by implication of law from the failure to object within a reasonable time.

ID.—WHEN ACCOUNT RENDERED BECOMES SUCH.—Merely rendering an account does not make it an account stated, but an account rendered and delivered to the debtor exhibiting the demand of the creditor, unless objected to within a reasonable time, becomes an account stated.

ID.—TESTIMONY TO SUSTAIN.—When the action is strictly on an account stated, to maintain such action the plaintiff must prove an account stated, as that, and nothing else, will support his allegations.

APPEAL from Jackson County.

E. De Peate, for Appellant.

A. S. Hammond, for Respondent.

LORD, J.—This was an action upon an account stated.

The complaint contained the usual allegations of an account stated, all of which was specially denied by the answer. Upon the trial, in consequence of a failure of evidence, the court, upon motion, instructed the jury to render a verdict for the defendants, and the jury returned a verdict for the defendants.

The errors alleged are, in sustaining objections of defendant's counsel to the introduction of the account and order, as evidence of an account stated, and in directing the jury to return a verdict for the defendants.

It appears by the bill of exceptions that one Martin, who was the agent of plaintiffs, doing business in San Francisco, sold to the defendant Bean a stump-puller, and that he, at that time, agreed to pay for it by an order on Mr. Patrick, which (order) was to be paid as soon as there

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Opinion of the Court — Lord, J.

was that amount due them from Mr. Patrick, for whom the defendants were working; that on the twenty-fifth day of May, 1888, the said Martin as such agent of plaintiffs presented the following bill to the defendants:—

“TRUMAN, HOOKER, & Co.

“SAN FRANCISCO, May 18, 1888.

“Sold to C. A. OWEN, Ashland, Oregon.

“One No. 5 stump-puller, irons, and grab-hook....\$95 00

“Dray..... 75

\$95 75

“Terms, sixty days.”

And that, according to the contract, the defendant gave to the agent, Martin, a written order on W. A. Patrick for the money, who agreed with Martin that the said order should be paid when the defendants had done work enough for him to amount to that sum. The order was as follows:—

“ASHLAND, OREGON, May 25, 1888.

“W. A. PATRICK, Esq.:—

“Please pay Truman and Hooker the sum of ninety-five dollars, and charge to us. Respectfully,

“C. A. OWEN,

“L. M. DEAN.”

That the “terms, sixty days,” as evidence on the bill meant that the amount stated therein would draw interest after sixty days, if not paid.

Substantially upon this state of facts, as disclosed by the evidence, the court sustained the objections aforesaid, and directed the jury to return a verdict for the defendants. The action of the court proceeded on the ground that there was a failure of proof, or that the facts as disclosed did not show an account stated, as alleged. As this is assigned as error, it becomes necessary to inquire into the nature of an account stated, in order to ascertain

Opinion of the Court — Lord, J.

whether the right principle was applied to the facts of the case. An account stated is an account which has been rendered by the creditor, and has been assented to by the debtor as correct, either expressly, or by implication of law from the failure to object.

Abbott's Trial Evidence, page 458, says: "An account stated is an agreement between persons who have had previous transactions fixing the amount due in respect of such transaction, and promising payment." Chitty on Contracts, page 458, says: "It must appear that at the time of accounting there existed some demand between the parties respecting which an account was stated, that a balance was then struck and agreed upon, and that the defendant expressly admitted that a certain sum was then due from him as a defendant." (See also Greenl. Ev., sec. 126.) As defined by Lord Mansfield, an account stated is an agreement by both parties that all the articles in the account are true. (*Trueman v. Hurst*, 1 Term Rep. 40.)

To make an account stated, there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims, and to establish such an account so as to preclude a party from impeaching it, save for fraud or mistake, there must be proof of assent to the account as rendered, either express or implied, from failure to object within a reasonable time. (*Stenton v. Jerome*, 54 N. Y. 480.)

An account rendered and delivered to the debtor, exhibiting the creditor's demand, unless objected to within a reasonable time, becomes an account stated. But merely rendering an account does not make it an account stated; or where it is simply rendered by one party against another, it is not an account stated between the parties. (*Spangler v. Spangler*, 22 Pa. St. 454.)

The great majority of cases refer or cover accounts rendered, followed by a failure to object thereto. In such

Opinion of the Court — Lord, J.

cases, the agreement is implied from all the circumstances, and in particular from failing to dissent within a reasonable time.

As stated in *Toland v. Sprague*, 12 Pet. 335: "The mere rendition of an account does not make it a stated one, but if the other party receives the account, admits the correctness of the items, claims the balance, or offers to pay it, as may be in his favor or against him, then it becomes a stated account." Nor did the court think it "important that the account was not made out as between the plaintiff and defendant," but the plaintiff having received it, having made no complaint as to the items or the balance, . . . thereby adopted it, and by his own act treated it as a stated account." But in all such cases, there must be proof in some form of an express or implied assent to the account rendered by one party to another before the latter can be held to be so far concluded that he can impeach it only for fraud or mistake.

Said Folger, C. J.: "This is strictly a cause of action on an account stated. It is that, and nothing else. To maintain the action as averred in the complaint, the plaintiff must prove an account stated; that, and nothing else, will support his allegation. An account stated is an account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance. (*Barr v. Barr*, 8 Pick. 187.) . . . The emphatic words of a count upon an account stated were, in former days, *insimul computassent*, — that they, the plaintiff and defendant, accounted together; and the court went on to say that on such accounting the defendant was found in arrear and indebted to the plaintiff in a sum named, and being so found in arrear, he undertook and promised to pay the same to the plaintiff. (2 Chitty's Pleading, 90; 1 Chitty's Pleading, 358.)" *Volkening v. De Graft*, 81 N. Y. 271.)

Opinion of the Court—Lord, J.

From all this, to constitute an account stated it must appear that the plaintiff and defendant accounted together on their mutual demands, or of the demands of the plaintiff against the defendant, and upon the accounting there was found due to the plaintiff from the defendant the amount claimed. It will be noted, then, that the account stated relates to some previous transactions or dealings between the parties, or to some article or articles formerly sold by one to the other, and that the relation of debtor and creditor already exists between them, and that subsequently to such transactions there is a mutual agreement between them as to the allowance or disallowance of their respective claims, and striking of a balance or agreement as to the amount due, or some other assent, either expressly or fairly to be implied from the circumstances, as failure to object within a reasonable time from the presentation of the account. The idea is, that there was an agreement between the parties, founded upon an examination of the transactions embraced, either active or presumptive. It is said to be in the nature of a new promise, but the consideration of the promise is the stating of the account.

Now, the admitted facts as stated show that the original contract of sale included as part of its terms the giving of the order as aforesaid, and that when the stump-puller and bill for the same were forwarded by the plaintiffs to their agent, and the defendants were notified of its arrival, and the bill presented to them, that they, in fulfillment of such contract as made by Owen, gave the order on Patrick to pay the plaintiffs as soon as that much was due them for their work. Here there was no accounting,—no meeting of the minds of the parties upon some previous transaction, and the stating of an account, involving something in the nature of a new promise; but what was done was done, not only as a part and parcel of, but in

Points decided.

fulfillment of, the original contract. Nor was the order given as an admission *then* of an amount due from a past transaction,—a machine formerly sold,—but as a part of the original transaction itself, and in execution of the agreement, upon their part, in respect thereto. More: it was given not only as a part of such original transaction, but at a time when the claim was not due according to the contract, or the bill presented as explained by the agent.

Upon the undisputed facts as disclosed by this record, the court committed no error in rejecting the evidence and directing the verdict as already stated.

It follows that the judgment must be affirmed.

17	598
20	419
30	420
21*	670
23*	276
17	523
36	522
17	528
440	80
40	472

[Filed May 3, 1899.]

CORBELL, RESPONDENT, v. CHILDERS, APPELLANT.

REPLEVIN — VERDICT — HILL'S CODE, SECTION 214. — In an action of replevin, if the verdict contains all that is required by this section, it must be held to be sufficient.

JURISDICTION OF THE COURT — ANSWER. — The plaintiff's complaint, in an action of replevin commenced in the county court, alleged that the value of the property demanded was \$365, and the defendant's answer alleged its value to be \$1,060: *held*, that the court had jurisdiction of the subject of the action, which was not defeated or ousted by the answer, and that the question of jurisdiction could be summarily determined on motion.

ANSWER — JURISDICTION. — Where the complaint presents a case within the jurisdiction of the court, and the answer pleads facts showing it to be beyond its jurisdiction, the plaintiff is entitled to have the case tried, and if the defendant should sustain his answer by proof upon the trial, the only effect of such trial finding would be, that the plaintiff could obtain no relief, and the action would be dismissed.

APPEAL from Klamath County.

S. B. Cranston, for Respondent.

Cogswell & Cogswell, and *J. W. Hamakar*, for Appellant.

Opinion of the Court — Strahan, J.

STRAHAN, J. — This is an action of replevin to recover possession of sundry chattels alleged to be wrongfully taken and withheld by the defendant, who was the sheriff of said county, and seized said property as the property of the defendant in a certain writ of attachment placed in his hands for service.

The plaintiff alleges title to all of said property in himself, and that the same is of the aggregate value of \$365. The answer alleged said property to be of the value of \$1,060, which was put in issue by the reply.

The action was originally commenced in the county court of Klamath County, where the plaintiff had judgment, and upon an appeal to the circuit court the plaintiff again prevailed, from which last-named judgment this appeal was taken. The appellant makes the following assignments of error in his notice of appeal: "1. The circuit court erred in overruling defendant's motion to dismiss said action; 2. The court erred in refusing to set aside the verdict; 3. The court erred in giving judgment according to the verdict; 4. The court erred in giving and entering judgment at all." The cause was submitted here on the briefs of counsel without an oral argument.

The appellant's main contention is, that the verdict is insufficient to authorize the rendition of the judgment. The verdict is as follows: —

"We, the jury impaneled to try the above cause, find for the plaintiff, as follows: 1. That the plaintiff is entitled to the immediate return and possession of the following articles of property named in plaintiff's complaint, to wit: Two old two-horse wagons; one sulky hay-rake; one Buford gang-plow; two walking-plows; one hundred head of hogs, more or less; and we further find that the wagons are of the value of thirty dollars, the sulky hay-rake is of the value of fifteen dollars, the disc harrow is

Opinion of the Court — Strahan, J.

of the value of thirty dollars, the Buford gang-plow is of the value of thirty dollars, the two walking-plows are of the value of ten dollars, and the hogs are of the value of one hundred dollars.

"I. D. APPLGATE, Foreman."

Section 214 of Hill's Code prescribes what the verdict shall contain in an action of replevin as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, *if their verdict be in favor of the plaintiff, or if they find in favor of the defendant*, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

1. A verdict which contains all that this statute prescribes must be held sufficient. "If the verdict be in favor of the plaintiff," the jury may at the same time assess the damages. How in favor of the plaintiff? Simply that he owns the property or is entitled to the possession thereof. The same remark applies when the jury find in favor of the defendant. In neither case is it necessary that the verdict should contain more than to find in favor of the plaintiff or the defendant, as the case may be, which finding must be followed by the other requisites of the statute. It was never intended, in any of the cases on this subject in this court, to hold that the verdict in this class of cases should follow the pleadings, and find affirmatively or negatively on every issue contained therein. In this case, the verdict is "for the plaintiff," and that he "is entitled to the immediate return and possession" of certain property described in the complaint, and then the property and its value are set out. To exact a greater

degree of particularity would be to go beyond the requirements of the statute, which I think would not be proper.

2. The motion to dismiss this action in the court below was without merit, and was properly overruled. The plaintiff claimed in his complaint that the value of the property in controversy was \$365; the defendant, that it was of the value of \$1,060. In this class of cases, the county court has jurisdiction where the claim or subject of the controversy does not exceed the value of five hundred dollars. (Hill's Code, sec. 868.) Of course, by simply alleging in the answer that the value was greater than five hundred dollars, the jurisdiction of the court could not be ousted. The plaintiff's action on the face of the complaint appeared to be within the jurisdiction of the court. If jurisdiction existed in fact, no difference what the answer contained, the plaintiff had a right to a trial, and in such case the question of jurisdiction could not be summarily determined on motion. If upon the trial it was shown that the claim or subject of the controversy exceeded five hundred dollars, a want of jurisdiction over the subject-matter of the action would have been established, and the plaintiff would have been entitled to no relief.

Finding no error in the judgment of the court below, it must be affirmed.

Opinion of the Court—Strahan, J.

[Filed May 3, 1899.]

SWIFT, APPELLANT, v. MULKEY ET AL., RESPONDENTS.

PRACTICE—ASSIGNMENT OF ERROR.—The appellant must point out in his notice of appeal the particular error upon which he intends to rely. He cannot be permitted to say that the court erred in its charge on a particular subject, where the subject as well as the charge consists of numerous and distinct parts. The appellant must put his finger on the error complained of.

NOTICE OF APPEAL—ASSIGNMENT OF ERROR.—The assignment of error in the notice of appeal must consist of a specification of particulars, so that the adverse party as well as the court may know on what particular error the appellant intends to rely on the appeal.

CHARGE OF THE COURT—NUMEROUS PROPOSITIONS OF LAW—GENERAL ASSIGNMENT OF ERROR.—Where the charge of the court contains numerous propositions of law, an assignment of error covering all in the charge on a particular subject without further indentifying the part relied upon, the court will refuse to examine such proposition of law in the charge, to see if there is possible error.

QUITCLAIM DEED—COLOR OF TITLE.—Color of title is that which in appearance is title, but which in reality is no title. A claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitations, other requisites of those statutes being complied with.

APPEAL from Multnomah County.

Fred R. Strong, for Appellant.

George H. Durham and *A. F. Sears, Jr.*, for Respondent.

STRAHAN, J.—This is an action to recover 120 acres of land, situate in Multnomah County.

The answer denied the allegations of the complaint,—which was in the usual form,—and then alleged that the defendants owned the demanded premises as tenants in common. The answer further alleged an adverse possession by the defendants for more than ten years next

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Opinion of the Court — STRAHAN, J.

before the commencement of this action. The reply denied the new matter contained in the answer. A trial in the court below resulted in a verdict and judgment in favor of the defendants, from which the plaintiff has appealed. The appellant's notice of appeal presents the following assignments of error for the consideration of this court: "1. The court erred in his charge to the jury as to the law governing or applicable to the case; 2. The court erred in his charge as to what constitutes the adverse, actual, open, exclusive, and notorious possession necessary to create or ripen into title to real property; 3. The court erred in instructing the jury that the deed from Hendrie to the defendants constituted color of title; 4. The court erred in instructing the jury as to the effect of the infancy of the plaintiff, upon the running of the statute of limitations; 5. The court erred in rendering judgment against the plaintiff."

The first and fifth assignments of error need not be further noticed than to say they are too general and indefinite to present any question for review on this appeal. The others will be noticed in their order.

1. The plaintiff's bill of exceptions does not present, in a clear or satisfactory manner, the questions which he seeks to litigate in this court. The second assignment of error is the one mainly relied upon on this appeal. The court gave numerous instructions on the subject of adverse possession; but this assignment does not point out, or in any manner make certain, the particular instruction which is claimed is erroneous. Under such a state of the record, it is not perceived how we can apply the assignment of error to any particular instruction on that subject. The proper rule of practice is, that the appellant must put his finger on the error complained of. He cannot be permitted to make a general assignment, and then, upon the argument, select some particular portion

Opinion of the Court — Strahan, J.

of the charge which is claimed to be within the general statement. Since the enactment of the present code, where an assignment of error in the notice of appeal is necessary, it must consist of a specification of particulars, so that the adverse party, as well as the court, may know upon what particular errors he intends to rely on the appeal. The charge is lengthy, and throughout the greater portion of it the subject of adverse possession is referred to and dwelt upon, but just what particular part of the charge the appellant claims the court defined "what constitutes the adverse, actual, open, exclusive, and notorious possession necessary to create or ripen into title to real property," has not been pointed out.

The entire charge of the court on the subject of the statute of limitations, adverse possession, disseisin, color of title, and other kindred subjects, is as follows:—

"The statute has provided that in this state no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action. Therefore, gentlemen of the jury, the issue is this: Upon the record title introduced here, the plaintiff has the title to this property, unless the defendants shall make out title and ownership under the adverse possession for ten years. So the question for you to determine is, whether or not the defendants have made out their claim of ownership of this property, under a claim of adverse possession for ten years. The legal title draws after it the possession, and the right of entry is not varied unless there has been a *decennory* [disseisin?], followed by actual, notorious, continuous, adverse possession for ten years next prior to the commencement of the action.

"To be an adverse possession, it must be an occupancy

under a claim of ownership, though it need not be under color of title. It is sufficient if a party goes upon the land and declares to the world by his acts and conduct that he is the owner of it, and maintains that attitude the requisite period, though his occupancy must extend over the entire tract claimed. The rule is different if made under paper title. This occupancy, if he actually occupied a part of it, will be extended by construction to the boundary specified in the instrument under which he claims. The distinction between entering into possession under paper title, or color of title, and mere claim of ownership, is, that under a color of title any adverse possession extends to the whole tract described in the paper title, while under a mere claim of ownership, adverse possession only extends to that part actually occupied. In this case, the Hendrie quitclaim deed, introduced in evidence by the defendants, would give the defendants color of title if they entered into possession under it, though it would convey no title in itself, and as a deed is a nullity, except as to giving color of title. Therefore, if you find the appellants entered into possession under the Hendrie deed, then they had color of title to the premises. An adverse possession under such deed would extend to the whole tract in said deed claimed by the defendants.

"It is not essential that a party who takes possession of land, and holds adversely to the owner, should enter under a deed, or other written title, to cause the limitation of ten years to run in his favor. It is sufficient if the party took possession under a claim of ownership, and held adverse possession, as explained in the instructions, for the period of ten years.

"The court instructs the jury that in order to maintain a defense in this action, it is not necessary that the defendants had a deed or written evidence of their title; but if, under a claim of ownership, the defendants took

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possession of this land in question, and have held exclusive possession thereof for the period of ten years prior to the commencement of this suit, then the plaintiff is not entitled to recover, and you should find for the defendants.

"The court further instructs the jury that when a party enters into the possession of land which is vacant and unoccupied at the time, claiming it as his own, such possession is hostile in its inception to the owner, and if he continues in possession adversely for a period of ten years, and is adversely, notoriously, and exclusively in possession during that period of time, such facts, if proved by the defendants, are a legal defense in an action of ejectment. If the jury find from the evidence that the defendants entered upon the land in question, claiming to be the owners, and continuing to be in possession of the same for ten years under claim of ownership, then the plaintiff is not entitled to recover.

"The court instructs the jury that it is not necessary that the land should be inclosed with a fence, or that a house should be erected upon it, or that it should be reduced to cultivation, to constitute possession; and such acts of dominion as are well known to persons residing in the neighborhood, as to who has the exclusive control and management of the land, will be sufficient to constitute possession; that the land is appropriated to such uses constitutes ownership [possession?] of it, and the manner in which it is established by the person claiming title is such as to notify the public that such person has asserted dominion. This will constitute possession.

"The jury are instructed that actual possession of land may arise in any of the different ways of occupying it which are not atrocious [tortious?] in their character, and which intention to appropriate to certain uses and purposes indicate an exclusive use and control of the property by the person claiming possession.

"The possession of land may be held in different ways,—by ownership, by cultivation, erection of buildings, or other improvements, or in any way that clearly indicates the exclusive appropriation of the property by the person claiming to hold it.

"I charge you that where the party has title or color of title to the land, and uses the land for the purpose of obtaining wood for fuel, or for his own farm under a claim of ownership, this would constitute possession. If a person holding a deed to land enters and clears off and breaks up or occupies a part, that need not be followed by other improvements to the land. This will be a possession of the whole.

"If you find from the evidence that the land in controversy was rough, uncultivated timber land, unsusceptible of cultivation or of being utilized for purposes of husbandry without large expense; that the defendants, or either of them acting for both, took possession of such land, or any part of it, openly or publicly under a claim of ownership, or went upon said land, or any part, openly and publicly, claiming then and there to take possession; that the defendants or either of them, after such formal act, maintained such attitude, even though not remaining upon the land in person openly, continuously, and adversely to all persons, and exclusively, without interruption from others for a period of ten years,—that would establish title in the defendants, and your verdict must be for them.

"The proof of title in the defendants, moreover, would be strengthened, if you find that the defendants, or either of them, exercised acts of ownership over said property by cutting timber, whether by themselves or under their authority or that of either of them, by paying taxes on the land, or by any similar acts. Besides, you may consider as further evidence of defendants' title the general

Opinion of the Court — Strahan, J.

knowledge of the public living near the land in controversy, the notoriety of the defendants' claim, the public avowals upon the part of the defendants of the claim of ownership, and the absence of any such acts on the part of the plaintiff or of his predecessors, if such be the evidence.

"To be adverse possession, it must be under a claim of ownership, though it need not be under color of title. It is sufficient if a party goes upon the land, and declares to the world by his acts and conduct that he is the owner of it, and maintains that attitude the requisite period. Where he occupies under color of title, I charge you that the deed introduced here by the defendants from Hendrie would constitute such as to the land included in it; if he actually occupied a part of it, such occupancy will be extended by construction to the boundaries specified in the instrument under which they claim."

At the end of each of these paragraphs of the charge are written the words, "excepted to; exception allowed"; but it nowhere appears by whom such exceptions were taken. If these paragraphs had been numbered, or in some manner identified, so that the assignment of error in the notice of appeal pointed out and made certain each particular error relied upon, I have no doubt the assignments would have been sufficient; or if the charge contained but a single proposition, and the assignment of error clearly identified and pointed it out, it would have been good. But where the charge contains numerous propositions of law on the same subject, some of which may be good law and others questionable, an assignment of error covering all in the charge on a particular subject, without further identifying the part relied upon, and particularly when there are numerous exceptions on the same subject, some of which were argued on the appeal and others were not, such assignment does not impose the

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duty on this court of separately examining each proposition of law in the charge, to see if perchance there is possible error. That is the duty of counsel. Such an assignment of error is too general. If such a practice were sustained, counsel need never do more than say in his assignments of error that the court erred in its ruling on particular subjects, without, in any measure, designating or pointing out the specific errors, and then asking this court to go on a voyage of discovery through the record in search of the particular error upon which counsel may be supposed to have relied. We cannot sanction such a practice. It is at variance with the requirements of our own code, section 537, and with the adjudged cases elsewhere. (*State v. O'Day*, 69 Iowa, 368; *Wood v. Whittton*, 66 Iowa, 295; *Bradley v. Johnson*, 67 Iowa, 614; *Landis v. Evans*, 113 Pa. St. 332; *People v. Sweeney*, 55 Mich. 586; *Lyman v. McMillan*, 8 Neb. 135; *Burlington etc. R. R. Co. v. Harris*, 8 Neb. 140; *Robbins v. Magee*, 96 Ind. 174; *Garretts v. Wills*, 63 Iowa, 256; *Morris v. Chicago etc. R. R. Co.*, 45 Iowa, 29; *Gulf West Texas etc. R. R. Co. v. Montic*, 61 Tex. 122; *State v. Gilreath*, 16 S. C. 100; *Blizzard v. Riley*, 83 Ind. 300; *Hoefer v. Burlington*, 59 Iowa, 281; *Bayles v. Stout*, 49 Mich. 215; *Lucas v. Brooks*, 18 Wall. 436; *Wade on Notice*, secs. 1212, 1213.)

Some portions of the charge may be open to criticism, and we must not be understood as affirming its correctness in every particular. Nor do we mean to intimate that, as applied to the facts of the particular case, it is an erroneous statement of the law; but simply that in the form in which the exceptions were taken, and error assigned thereon, we cannot undertake to review particular portions of the charge. We announce this conclusion with the less reluctance, for the reason that we are, in the main, satisfied that the court below stated the law correctly to the jury on the point under consideration.

Opinion of the Court—STRAUSS, J.

2. The court told the jury that the deed from Hendrie to the defendants was sufficient to give them color of title, if they entered under it, and in this there was no error. The supreme court of the United States in *Wright v. Mattison*, 18 How. 50, defined what is color of title. In passing on the question that court said: "The courts have concurred, it is believed without an exception, in defining color of title to be that which in appearance is title, but which in reality is no title. We refer to a few decisions by this court, which are deemed conclusive to the point that a claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitation, other requisites of those statutes being complied with." The court then cites *Gregg v. Lessee of Sayer*, 8 Pet. 253, 254; *Ewing v. Burnett*, 11 Pet. 41; *Pillow v. Roberts*, 13 How. 472; to which may be added *Hall v. Law*, 102 U. S. 461.

3. Counsel for appellant suggest in their brief that such possession as is shown by this evidence cannot amount to adverse possession, such as is necessary to enable the defendants to maintain this defense. All of the evidence given upon the trial is not before this court, and we cannot therefore determine as a matter of fact, were it otherwise competent for us to do so, whether such possession was sufficient or not. But in addition to this, where there is any evidence or disputed point, though it be but slight and inconclusive, it is for the jury to determine the fact, and it is generally beyond our province to interfere. The defendant might have embodied his views, in instructions defining more particularly and clearly the

Opinion of the Court—Steehan, J.

character of the possession necessary to set the statute of limitations running against the claim of him who had the legal title, and if it was correct, and the court refused such instructions, this court would correct the error, but it has no authority to review the question of fact, or to declare that the defendants' possession was not adverse in the face of the verdict of a jury finding that it was.

4. As no particular error in the charge of the court, on the subject of the running of the statute of limitation during the plaintiff's minority, was pointed out upon the argument, the court repeated to the jury the substance of the statute on that subject.

Neither party asked more, and the cause went to the jury under that charge. It left to the jury all the questions of fact as to the plaintiff's age when his cause of action accrued, and when he obtained his majority. These and other facts of a like nature, all growing out of the plaintiff's claim of the disability of infancy, properly went to the jury, and the verdict being against the plaintiff, while it stands the fact is not open to inquiry here or elsewhere.

The appellant's contention on the point is one, not of law, but of fact. It is superfluous to add that we do not re-examine questions of fact in this class of actions. There are two or three clerical errors in the charge of the court, but they are apparent, and it was not claimed upon the argument that they in any manner affected the result; besides, the words which should have been used, and probably were, are readily supplied from the context. But nothing was claimed on account of these clerical mistakes, and it is unnecessary to notice them.

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[Filed May 3, 1889.]

SISEMORE, APPELLANT, v. SISEMORE, RESPONDENT.

WILLFUL DESERTION — DIVORCE. — Willful desertion is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other.

APPEAL from Jackson County.

H. K. Hanna, for Appellant.

C. W. Kahler and *H. Kelly*, for Respondent.

STRAHAN, J. — This is a suit for a divorce. The amended complaint contains two causes of suit. Our attention will be directed only to the first cause specified.

The material part of the amended complaint is as follows: "That about five years ago plaintiff, with his said wife and children, moved from Jackson County to Crook County, in said state of Oregon, and that plaintiff ever since and now is a resident of Crook County; that in October, 1885, the defendant returned from Crook County to her former home in Jackson County, and has ever since remained there; that ever since said last-mentioned date said defendant has willfully deserted the plaintiff, and has willfully remained away from him and their said home, and, though often requested by the plaintiff, has ever since said last-mentioned date persistently refused to return to the plaintiff or their said home, or to longer cohabit with plaintiff thereat."

These allegations were met by denials, the cause was referred, and much evidence taken on both sides. Upon a trial in the court below, the suit was dismissed, and costs adjudged against the plaintiff from which decree this appeal was taken.

1. It appears from the evidence that these parties were

Opinion of the Court—Strahan, J.

married on the thirteenth day of December, 1867, in Jackson County, Oregon; that at the time of her marriage with the plaintiff she was a widow, and the mother of three children by her former husband. It also appears that for some time before the final separation an estrangement grew up between these parties; but, so far as the evidence discloses, the plaintiff was not its cause, nor did he in any manner encourage it. Antagonism also grew up between the plaintiff and the children of the defendant by her first marriage. The plaintiff was largely engaged in stock business, and as the range failed in Jackson County, he was compelled to seek other range, or cease the business. He first went to Klamath County, and then afterwards established himself in Crook County, where he still continues to be engaged in that business. The defendant, for some time after the plaintiff went to Crook County, continued to reside upon her farm in Jackson County, where she and her first children carried on farming and stock-raising. Finally, she went with plaintiff to his home in Crook County, and remained there with him for some time, taking with her her younger children. In 1885, she expressed a wish to return to her former home, in Jackson County, for the purpose of schooling the children, and the plaintiff consented to it, and brought her and the children back. When the plaintiff again visited them, he objected to the manner in which the defendant was schooling the children. It seems that the plaintiff wished the children to be regularly kept in school, but the defendant thought there was plenty of time to school them later. During this visit, the defendant and her two older boys treated him very coolly. On this occasion the plaintiff wished the defendant to return to Crook County with him. When he again came down he wanted to know of the defendant if she was not ready to go home, but she told him, in substance, that she had a very good

Opinion of the Court — Strahan, J.

home where she was, and that she did not see any use in going up to Crook County. This was about one year after the plaintiff brought her down. It was on this occasion that the defendant proposed that the plaintiff should return to Jackson County, but the plaintiff told her he could not do it; that he had a homestead in Crook County, which was his home, and that he did not propose to come down here to live with her and the boys.

On this occasion, the plaintiff told the defendant that she did not treat him as a wife ought to treat a husband, but she informed him that she treated him better than he deserved. The plaintiff then returned to his home in Crook County, the defendant remaining on her farm in Sam's Valley. Afterwards, the plaintiff came down again, and by this time it seems the estrangement between the parties was known outside of the family circle. A protracted meeting was in progress at Grant's Pass conducted by Revs. Jones and Sails. Mr. Jones sent for the plaintiff to come to church, who went without his wife. Jones told him to go back and bring her, as he thought he could assist them in getting together. Plaintiff did so. Before going, however, plaintiff asked the defendant if she would not be willing to go back up home to Crook County. She said no; she had a good home, and she had no assurance if she went but that she would have to come back, and the boys might not want to take her in. It was about this time that defendant said to plaintiff: "We all have lost all confidence in you." The plaintiff came down again, and asked the defendant to return to Crook County with him, which she did not do, but told him she had a good home where she was, and that the society was very bad up in Crook. The next time the plaintiff came down he remained from October till March. By this time, serious business complications had arisen between the plaintiff and Horace Pelton, a son of the de-

fendant by her first husband. The plaintiff many times during this sojourn urged the defendant to return with him to his home in Crook County, but she always put him off with some indefinite answer, and did not comply with his requests.

Other evidence tends to prove that the defendant withdrew from the plaintiff, and ceased to cohabit with him, without any cause or reason so far as appears. Nor is there any satisfactory excuse in this record for the failure and refusal of the defendant to return with her husband, and reside with him in Crook County where he had established the home of the family. It is true she did not directly refuse in words, but she did it by acts, which were far more decisive, and she always treated the matter evasively when approached on the subject by the plaintiff.

Do these facts, so very briefly outlined, constitute willful desertion within the meaning of the statute making it a cause for a divorce?

1 Bishop on Marriage and Divorce, section 776, says: "Desertion in divorce law is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification, either in the consent or wrongful conduct of the other." In section 782 the same learned author says: "This question, as one of principle, is not without difficulty. Still if a party to the marriage should refuse to the other party whatever lawfully belongs in marriage alone,—refuse not from consideration of health, not from any other temporary considerations, but from alienation of affection, from perverted religious notions, or from any other cause resting permanently in the will, and not in physical inability,—the refusing party would thereby withdraw from whatever relation of marriage, distinguished from every other relation subsisting between

Points decided.

human beings, is understood to imply. Therefore he should be holden to desert thereby the other."

I think enough is shown by the plaintiff to constitute willful desertion within the statute, and for that reason the decree of the court below must be reversed, and a decree entered in this court allowing the plaintiff a divorce from the defendant, but upon the express condition that the plaintiff first release all claim and interest in the wife's lands by reason of said decree, and neither party to recover cost against the other.

At this time no order will be made as to the custody of the children, other than which ever party has their custody shall make no claim on the other for their support.

The court below will have power to make orders in relation to their care and custody as occasion may require.

LORD, J., concurred in granting a divorce.

[Filed May 3, 1889.]

JOHN SISEMORE, APPELLANT, v. HORACE PELTON,
RESPONDENT.

IN A SUIT TO ESTABLISH BY PAROL EVIDENCE A RESULTING TRUST IN REAL PROPERTY, upon the alleged grounds that it was purchased and the conveyance of the legal title taken in the name of one person, while the purchase price was paid by another, the evidence of the payment of the purchase price, or of the exact portion of it which was paid, where payment of a part only is claimed, in order to be effective, must be clear, certain, and convincing. And it is indispensable to the establishment of such a trust that the payment should be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him, as a part of the original transaction of purchase, at or before the time of the conveyance.

IN ORDER TO ESTABLISH A CONSTRUCTIVE TRUST IN REAL PROPERTY, upon the grounds that the conveyance of the legal title was taken by one possessing some fiduciary character, or standing in some fiduciary relation, it must be shown by clear and unmistakable evidence that the purchase was made with trust funds.

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Statement of Facts.

WHERE S. AND P. WERE PARTNERS IN BUSINESS, and the latter purchased from I. a certain tract of land by taking an assignment from I. of a certificate of purchase thereof from the state, which I. had received upon his purchase of the land as school land; and upon which purchase he paid one installment and executed his three several promissory notes in payment of the other installments, which, by an understanding with P., had with him at the time of the assignment of the certificate of purchase, I. was to pay off, but neglected the payment of two of them, and S. subsequently, and long after the death of P., paid them, with the accrued interest thereon, and had the deed to the land executed by the state to P.: *held*, that the fact of such payment by S. did not give a resulting trust in his favor; *held further*, that as there was no evidence showing that P. in his purchase of the land from I. paid for it with partnership funds, S. could not claim that a constructive trust arose, or was created in his favor.

H. K. Hanna, for Appellant.

C. W. Kahler, for Respondent.

APPEAL from a decree of the circuit court for the county of Jackson, dismissing the appellant's complaint. The appellant commenced a suit against the respondent in said circuit court, to have a resulting trust declared in his favor in a certain parcel of land, consisting of 160 acres, situated in what is known as Sam's Valley, Jackson County, Oregon, and designated as the Hyde ranch. The land is the northeast quarter of section 36, township 35 south, range 3 west, and was formerly school land belonging to the state of Oregon. It appears that one Mat R. Ish bought the land at a public sale of school lands in Jackson County, made by M. A. Williams, superintendent of common schools for that county, in pursuance of an order of the board of county commissioners thereof, and received the following certificate of purchase:—

"January 31, 1863.

"Jackson County, }
 State of Oregon.)

"This is to certify that at a public sale of school lands, under the order of the board of county commissioners, I

Statement of Facts.

this day sold to Mat R. Ish the following described tract of land, to wit, the northeast quarter of section No. 36, in township No. 35 south, of range No. 3 west, Willamette meridian, containing 160 acres.

"M. A. WILLIAMS, Sup't Com. Schools."

It does not appear clearly what the purchase price of the land was, nor what payments were made thereon at the time of the purchase. It appears, however, that Ish executed three promissory notes to the state of Oregon for eighty dollars each, to be paid in one, two, and three years from the date of the purchase, with interest thereon at the rate of ten per cent per annum, and that in 1863, the year in which he purchased the premises, he paid of the purchase price eighty dollars. Hence it may be inferred that the price of the land was two dollars an acre, aggregating \$320, and that it was to be paid for, one fourth cash at the time of the sale, and the balance in the notes mentioned. On the back of the said certificate is the following indorsement:—

"For value received, I hereby assign and transfer all my right, title, and interest of and in the within certificate of sale to E. C. Pelton, or assigns, and authorize the deed for the land mentioned therein to be made to the said E. C. Pelton or his assigns.

"Witness my hand this twenty-second day of October, A. D. 1864.

"MAT R. ISH.

"Witness: WILLIAM HOFFMAN."

It further appears, by a certificate given by John Neuber, as treasurer of Jackson County, bearing date November 10, 1871, that said Ish, in 1864, paid to said county treasurer the sum of eighty-eight dollars on school land purchased by him from the superintendent of common schools. The appellant claimed in his testimony given in the case that, in the summer or fall of 1863, he entered

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into a partnership with said E. C. Pelton, who then resided in said Jackson County; that the business of the partnership at that time was to be the buying and selling of hogs and other personal property; that appellant was unmarried at the time, but Pelton had a wife and a family, and the former resided and made his home with the latter upon a farm occupied by him, known as the Sam Smith ranch, the title of which was in Mary S. Pelton, then the wife of said E. C. Pelton, and one of the respondents herein; that late in the year 1863, or early in 1864, the said partners agreed to extend their business, and buy up and own land in said Sam's Valley; that in October, 1864, on appellant's return from Yreka, California, where he had been with a drove of hogs, he was informed by Pelton that the latter had purchased the said Hyde ranch for the partnership. The appellant's account of the affair is as follows: "In 1864, after we had this talk [referring to their conversation in regard to forming the partnership], he mentioned about buying the Hyde ranch, as we called it at that time, and we agreed for him to buy it if we could. After that, a while after I came back from California, again he told me he had bought this piece of land. That is the first piece we had bought since we had been partners. I don't know who he bought it of,—only what he told me. He told me he bought it of Mat Ish. I asked him at the time if long-nosed Bill Hyde was not in with Ish in this ranch. I think, as well as I recollect, he kind of laughed and said he had it all right. He did not show me any deed of conveyance for this land, and all I know about the purchase of it by Pelton was what he told me after I returned from California." It further appears that in February, 1865, appellant bought for the partnership a ranch adjoining the Hyde ranch, known as the Miller ranch, and took the deed to it in the name of Sisemore and Pelton, and farmed both of these ranches,

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until the death of Pelton, which occurred September, 1865; that Pelton, at his death, left said Mary S. Pelton his widow, and the other respondents, his minor children, aged respectively eight, six, and four years; that appellant continued to reside with the family until 1867, when he married the widow, Mary S. Pelton, who is now his wife; that he was appointed administrator of the said E. C. Pelton, and took charge of the family and all of the said ranches. In his testimony, in answer to the question, "If, after the death of Mr. Pelton, he, at any time, ascertained that the title to this Hyde place was still in the state of Oregon, he might state when it was that he first ascertained it, and all that he did toward obtaining a title from the state," the appellant made the following answer: "I think it was in 1870 I came here to town, as there was a boom in land at that time, and I got uneasy about my titles, and I spoke to Jim Fay, and asked him to go down to the clerk's office with me and look up the titles of my land for me. He told me he could find nothing of this Hyde ranch on record. We then went to Mr. Hoffman, and he could not find anything. I then left it in the hands of Fay to do something with it, I did not know what, to try to get a title for me. I went home and left it in the hands of Fay. The next time I came back to town Fay told me 'he had no trace of anything.' I then went down to Ish's ranch, and inquired of Jacob Ish where Mat was. He said he was down on the coast somewhere, but would be up here in a few days to run his header. Then when Mat came, he knew nothing. I says to Hoffman, 'Maybe you can find something in your private books, as Mr. Pelton always put a great deal of confidence in you.' He said 'he would go and see if he could.' He returned presently with two notes that Mat Ish had given to the state, that had never been paid. Mat Ish had given these notes in payment of the Hyde

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ranch; that is the way they read to me. Fay took the notes and looked at them, and says 'they were outlawed; let us go and see if you can make a payment on them and renew them.' We went up to Max Muller, I made a payment on those notes, and he indorsed it on the notes. I then told him I would pay these notes off as soon as I could get the money. Fay had told me that was the only way I could get a title to it. Some time after that, I did not know how long it was, I got the money and came in and paid both notes. At the time I paid the notes I spoke to Fay, and told him I wanted half of the land that was mine. He advised me to pay the notes and take the deed out in Pelton's name, and they would hold the deed in equity, and it would show on record here, and I would have no trouble in getting my rights. Mr. Hoffman advised me to do the same. The deed was issued for this land by the state in the name of Mr. Pelton, to the best of my knowledge. I had the deed placed upon record. I don't recollect how much it was I paid on those two notes. I made the payment of these two notes with the intention of getting one half of the land. My understanding from Fay at the time was, that that was the proper way to do it." The appellant, in corroboration of his testimony above set out, produced as a witness one B. F. Miller, who testified as follows: "As near as I can remember, some time in the spring or summer of 1864, Mr. Pelton told me he had taken John Sisemore in as a partner in buying stock, grain, and anything to trade on. He stated as his reasons for doing so, 'because that he thought John was a better hand to buy them than he was.' He also said 'that John had some little money, and if John made any trade with me for stock it would be the same as if he had made it'; they frequently bought hogs of me,—sometimes one, and sometimes the other. Sisemore bought

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quite a large quantity of grain from me at one time, and paid the money for it, and Mr. Pelton received the grain. I sold them in February, 1865, as near as I can remember, a quarter-section,—the northwest quarter of section 31, township 35, range 2 west. Sisemore negotiated the trade, and I believe it is the land belonging to Sisemore and Pelton that is spoken of and known as the Miller ranch. During the conversation, after I had sold them this place, they told me their intention was to buy the Sam's Creek Valley. I made the deed to Sisemore and Pelton. They paid me fifteen hundred dollars for the ranch. Pelton was not present when the sale of the land was made. I said in my cross-examination that I believed that Mr. Pelton had purchased this Hyde property before I had this conversation with him about the partnership. I did not know at the time I was being questioned the exact date or month that Mr. Pelton bought the property from Ish. If this property was not bought by Mr. Pelton until the last of October, 1864, he told me of this partnership arrangement before; but I was under the impression that he had bought it before."

The appellant also produced as a witness Mrs. Sisemore, who testified that the occupation of Mr. Pelton, her former husband, at the time of his death, was farming and trading in hogs and stock; that appellant was engaged in business with him at the time of his death; that she could not say exactly how long they had been associated together in business, but thought it was since 1864; that there was no company purse kept by Mr. Pelton and Mr. Sisemore for household purposes that she knew of, and she thought there was no company purse kept by them at all. The respondent produced evidence tending to show that Pelton purchased the Hyde ranch prior to the formation of the partnership between him and the appellant; that appellant never claimed to have any interest therein un-

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til 1886, when in talking over the affairs of the family he claimed that he had paid eight hundred and sixty odd dollars to the state, and thought he ought to be entitled to half the place, as he had paid for it. It also appears in evidence that Mat R. Ish, on the seventeenth day of March, 1870, signed a promissory note, wherein he promised to pay to the heirs of E. C. Pelton, or bearer, \$272 for balance due on transfer of school land, and that he delivered the note to the appellant; that he did so after being informed by appellant that he, appellant, had paid the balance on the land.

THAYER, C. J.—In order to maintain the appellant's claim to an equitable estate in the premises in controversy, the facts of the case must show that a trust arose by operation of law in favor of the appellant. He must be able to demonstrate that the various transactions occurring between him and the said E. C. Pelton, and what he did in effecting title to the premises after Pelton's death, as disclosed by the evidence, created in his favor either a resulting or constructive trust. In other words, it must appear that in the purchase of the Hyde ranch, as it is called, the appellant paid the consideration money or some distinct part thereof; or that a fiduciary relation existed between him and Pelton at the time the purchase was made, and that the premises were paid for with trust funds.

The two classes of trusts arising by operation of law—resulting and constructive trusts—are distinct from each other; and the appellant's case must come within one or the other of them, or else he has no cause of suit. Either class of the trusts referred to may be established by parol evidence, but it must be clear, certain, and convincing.

Mr. Pomeroy says, in regard to the proof of a resulting trust, that "it is settled by a complete unanimity of de-

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cisions that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of payment by the alleged beneficiary beyond a doubt. Where the payment of a part only is claimed, the evidence must show in the same clear manner the exact portion of the whole price which was paid." (Pomeroy's Eq. Jur., sec. 1040.)

The same author also says: "In pursuance of the ancient equitable principle that the beneficial estate follows the consideration, and attaches to the party from whom the consideration comes, the doctrine is settled in England and in a great majority of the American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person, A, while the purchase price is paid by another person, B, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. In order that this effect may be produced, however, it is absolutely indispensable that the payment should be actually made by the beneficiary B, or that an absolute obligation to pay should be incurred by him *as a part of the original transaction of purchase*, at or before the time of conveyance; no subsequent and entirely independent conduct, intervention, or payment on his part would raise any resulting trust." (Pomeroy's Eq. Jur., sec. 1037.)

And said author, in speaking of constructive trusts arising from the acts of persons already possessing some fiduciary character or standing in some fiduciary relation, says: "The evidence that the purchase was made with trust funds must however be clear and unmistakable." (Pomeroy's Eq. Jur., sec. 1049.)

Tested by these rules, which are elementary, the appellant's counsel cannot reasonably claim that a resulting or constructive trust, in favor of the appellant, arose out of the facts proved in the case.

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It is not pretended that it is shown by the evidence that the appellant paid any part of the consideration money upon the purchase of the premises by Pelton from Ish, nor that the purchase was made with trust funds, although the counsel intimated at the hearing that it might be so inferred. But such facts cannot be so established by inference. They must be proved; not necessarily beyond a doubt, as Mr. Pomeroy states it, but by clear and cogent testimony, tending directly to confirm them.

The appellant did prove that he paid two of the notes, and accrued interest thereon, which were given by Ish in favor of the state of Oregon, upon the purchase by the latter of the premises from the school superintendent; but that of itself would not raise a resulting trust; it was not a payment of a part of the consideration of purchase of the premises by Pelton from Ish; it was a mere advancement upon a debt owed by Ish, and which, as between himself and Pelton's representatives, Ish was evidently bound to pay. And if it had been a part payment of the purchase price of the premises, upon the purchase by Pelton from Ish, it would not have aided the appellant's claim, as it was not a payment made "as a part of the original transaction of purchase, at or before the time of conveyance." I mean by the conveyance, the assignment of the certificate of purchase of the premises by Ish to Pelton.

The appellant's counsel seemed inclined to claim at the hearing that the payment by the appellant of the two notes and interest to the state constituted in some way a purchase of the premises from the state, which gave rise to a trust in the appellant's favor; but that position, in view of the facts, is not tenable. Ish purchased the property from the agent of the state, and sold his right under the purchase to Pelton. What the terms of the sale from

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Ish to Pelton were, however, do not appear, although it is evident that Ish understood that he was to pay off the notes given for the purchase-money of the premises. He did pay one of them the same year he made the assignment to Pelton of his certificate of purchase, but neglected the payment of the other two, and they remained unpaid until the appellant discovered the fact, long after they had matured, and paid them, and caused the deed to be executed from the state to Pelton, although dead at the time. Ish, it appears, about the same time executed to Pelton's heirs his promissory note, intended to cover the advancement made by the appellant. That the transactions last referred to did not raise a resulting trust, is too apparent to require discussion. The act was a very generous one on the part of the appellant, but he secured to himself no legal rights thereby beyond a claim for money paid, laid out, and expended, if any at all.

Under the view herein expressed, the decree appealed from must be affirmed.

An order will therefore be entered herein accordingly.

[Filed May 3, 1889.]

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CALLAHAN, RESPONDENT, v. PORTLAND & W. V.
R. R., CO., APPELLANT.

APPEAL — UNDERTAKING — WAIVER OF EXCEPTIONS TO SUFFICIENCY OF SURETIES. — The time when an appeal shall be deemed perfected is not changed or affected in any way by the respondent's filing in the cause a written waiver of all exceptions to the sufficiency of the sureties in the undertaking.

APPEAL — WHEN DEEMED PERFECTED. — "Within five days" after the filing of the undertaking is the "time allowed" to except to the sufficiency of the sureties in the undertaking, and it is from the expiration of that time, when the sureties are not called on to justify, that the appeal shall be deemed perfected.

APPEAL from Multnomah County.

W. L. Boise, for the motion.

J. M. Bower, *contra*.

STRAHAN, J.—On the ninth day of February, 1889, the plaintiff recovered judgment against the defendant. On the twenty-eighth day of the same month the defendant duly served its notice of appeal in Multnomah County, and on the same day filed its undertaking on appeal. On the first day of March, 1889, the plaintiff served upon the defendant and filed in said cause a paper, wherein it is recited “that the plaintiff above named hereby waives all objections to, and all right to except to, the undertaking on appeal, filed herein on February 28, 1889, by the above-named defendant, upon the appeal herein of the above-entitled action to the supreme court of the state of Oregon, and hereby waives all objection and all rights to except to the sufficiency of William Reed as surety on the said undertaking.” On the fifth day of April, 1889, the respondent filed in this court properly certified copies of the judgment, notice of appeal, proof of service, and waiver of objections to the sufficiency of the surety on appeal, and asked an affirmance of the judgment, with ten per cent damages, for the reason the appellant neglected to file the transcript in this court within the time allowed by law.

Section 541 of the code provides that upon the appeal being perfected, the appellant must, by the second day of the next regular term of the appellate court thereafter, file with the clerk of such court the transcript of the cause.

It is for a non-compliance with this section that this motion is made, and it therefore becomes necessary to determine when the appeal is “perfected” within the meaning of this section.

If the appeal was “perfected” on the first day of March, when the waiver of objections to the surety was filed, then the appellant was bound to file his transcript in this court

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by the second day of the March term, which term commenced on the first Monday, the fourth day of March. This depends upon the construction to be given to two provisions of the code:—

Subdivision 2 of section 537 of the code, which is as follows:—

“2. Within ten days from the service of the notice of appeal, the appellant shall file with the clerk an undertaking as hereinafter provided. *Within five days thereafter*, the adverse party shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.”

Subdivision 4 of section 537 of the code provides:—

“4. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof, if excepted, the appeal shall be deemed perfected.”

“Within five days” after the filing of the undertaking is the *time allowed* to except to the sufficiency of sureties in the undertaking, and it is from the expiration of that time, where the parties are not called on to justify, that the appeal shall be deemed perfected. The appeal was not, therefore, perfected prior to the beginning of the March term, and that term was not “the next regular term of the appellate court thereafter.” If the words “five days” had been inserted in subdivision 4 of section 537, instead of the word “time,” the meaning of the section would not have been altered, but it might have been a little more obvious.

If the defendant may waive his right to except to the sufficiency of the sureties on the appeal, no other consequences follow such waiver other than that the right to make the exception is lost or terminated by the act of the party. The appeal is not perfected in such case until the “*time allowed to except*” shall have fully expired.

The motion must therefore be denied.

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[Filed May 3, 1889.]

LEE, RESPONDENT, v. COLE AND STRUBLE ET AL.,
APPELLANTS.

MORTGAGED PROPERTY — IDENTIFICATION OF — WHEN MORTGAGED. — In order to mortgage property, so as to create a lien upon it, such property must be ascertained and identified at the time of the execution of the instrument.

EQUITABLE MORTGAGE — IDENTIFICATION OF THE PROPERTY. — Where an equitable mortgage is claimed as the result of an agreement, there must be, at the time such agreement was made, such an identification of the property as that the equitable mortgagees may say, with a reasonable degree of certainty, what property it is that is subject to their lien.

APPEAL from Benton County.

W. S. McFadden, for Respondent.

J. W. Rayburn, for Appellants.

LORD, J.—This is a suit to foreclose a chattel mortgage.

It being alleged in the complaint that the defendant had or claimed some interest therein, they answered, in substance, as follows: That the defendants and plaintiff, as sureties for defendants Cole and Struble, executed and delivered their note for four hundred dollars to one Irvine; that Cole and Struble promised to give the plaintiff and defendants a chattel mortgage on the personal property mentioned in the complaint of the plaintiff within a reasonable time, and that although often requested, he had neglected and failed so to do until long after the plaintiff's mortgage was executed, and that plaintiff had full knowledge of such agreement when he took his said mortgage; that defendants, including the plaintiff, were compelled and did pay said note according to each one's proportion; that subsequently Cole and Struble executed and delivered to the defendants, including the plaintiff, a

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chattel mortgage to secure such sum upon the property described in the plaintiff's complaint, which was intended by Cole and Struble and accepted by the defendants as and for the mortgage agreed to be given, all of which is denied by the plaintiff excepting the making of the mortgage by Cole and Struble to plaintiff and defendants.

The court rendered a decree foreclosing both mortgages, but adjudged the plaintiff's mortgage to be the first mortgage, etc. The record presents several questions, and the evidence in relation to them is vague, often conflicting, and somewhat unsatisfactory.

It seems that the sum of money, for which the defendants claim that their mortgage ought to be considered prior to the plaintiff's mortgage, was procured by the names of the defendants and the plaintiff as security, to establish a party newspaper, but the evidence in respect to the agreement of Cole and Struble to give a chattel mortgage to secure the same is disputed by one of them, and the evidence of some of the other defendants indicate that their knowledge of such promise was obtained after the signing of the note.

It is no doubt true that the defendants Rayburn and Johnson understood that a chattel mortgage was to be given, and they testify such was the condition upon which they signed. The defendant Grimm's testimony is direct that he had no conversation upon this subject with Struble until after the signing of the Irvine note as one of such security, and that he had had no conversation with the plaintiff either before or after the signing of such note.

The plaintiff Lee is positive that no mention was made of a chattel mortgage as security at the time he agreed or became a surety upon the note; but the defendant Rayburn testifies that he told him that it was the understanding that such a security was to be given.

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Looking at the face of the evidence, the impression comes that it is probable that some one of the defendants, knowing or being advised that Cole and Struble proposed to start a newspaper, and to forward that enterprise, did the principal part of the business with them, and in securing the signatures as security upon their note, and that the others derived their information principally through him.

However this may be, it is clear that the defendants Cole and Struble were proposing to start a paper, and to secure the means to found their project, agreed to run the paper in a party interest, and this the plaintiff Lee testifies is the ground upon which he became surety upon the note. But if we assume that the defendants Cole and Struble did agree to give the chattel mortgage to secure the defendants and the plaintiff against loss on account of signing the note, two other questions arise, of importance upon this record, viz.: 1. What was the property which the chattel mortgage was intended to secure? and 2. Whether the plaintiff is chargeable with knowledge of such agreement to give such chattel mortgage upon such property.

In order to mortgage property so as to create a lien upon it, such property must be ascertained and indentified at the time of the execution of the instruments. Here the claim is, that the mortgage subsequently executed was only taken as and for the mortgage originally agreed to be given at the time the note was signed as security, etc., and is therefore in this view an equitable mortgage, and that to create a lien upon property, such property must have been ascertained and identified, at least with a reasonable decree of certainty at the time such agreement was made, and to which it owes its existence.

"There must be," said Folger, J., "an identification of

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the property, so that the equitable mortgagee may say, with a reasonable decree of certainty, what it is that is subject to his lien." (*Payne v. Wilson*, 74 N. Y. 352.)

The evidence discloses that the property, whatever that was, to furnish the security was not in the state or county, or in possession of Cole and Struble, but was represented in a general way to be in San Francisco, or on the way to this state from that place, but of what it consisted, except that it was styled the "Chronicle plant," which was supposed to mean everything necessary to run the Chronicle newspaper, does not distinctly appear. In fact it does not appear definitely when the plant was ordered, and of what it consisted, and no one pretends to any specific information concerning it, or could, at the time the alleged agreement was made, enumerate in the most general way what it was that was subject to his lien.

It is true, some of them say that they mean by the "plant" all those things which were subsequently included in the mortgage executed to them, or included the property mentioned in the pleadings, but the evidence shows that after the agreement was made, out of which the equitable mortgage originated, that much of the property to which they refer was purchased afterwards, and added to the firm property of Cole and Struble. And according to Mr. Struble's testimony, this was "nearly all of the job material, including job printing machine, several racks, cases, blank paper stock, job printing inks, and numerous other fixtures and furniture to the job department; also important and necessary additions to the newspaper plant proper, including about one hundred pounds of long primer type, a large supply of leads, slugs, etc." So that the mortgage executed to the plaintiff, and the mortgage executed subsequently to the defendants and plaintiff, included much more material than could have possibly been contemplated by the agreement, and

the evidence of the defendants, although given in the utmost good faith, shows that they did not know, nor could have told, as equitable mortgagees, at the time of the agreement, with a reasonable degree of certainty, what property it was that was subject to the lien of their equitable mortgage.

“In order,” says Mr. Pomeroy, “that a lien may arise, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation.” (Pomeroy’s Eq. Jur., sec. 1235.)

It is too manifest for controversy that the evidence fails to disclose the particular property to which the alleged agreement refers, so as to identify it, and to create a security. Under such circumstances, how is the court to know to what property the lien of the equitable mortgage applies, or how much was included in the plaintiff’s mortgage which belonged to the “Chronicle plant” when such alleged agreement was made. Yet to furnish the relief asked for by the defendants, this duty was incumbent upon them, and if they have failed to establish it, the court must deny their prayer.

As to the plaintiff’s knowledge of the alleged agreement at the time he took his mortgage, the evidence is conflicting, but however this may be, the facts show that he could not have known what property was to be subject to the lien. The circumstances indicate that Cole and Struble were anxious to secure the money to start the paper, and that the defendant Rayburn was the enterprising and managing man that secured it for them, and no doubt much that was talked between them and each of them with the others was supposed to be known by all, and in

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this way honest differences as to the facts came about. It often happens that differences arise and misunderstandings occur as to a state of facts between men whose character for integrity and probity is beyond reproach, and while the court must often press its way through conflicting testimony to a result, it does not imply a want of good faith or honesty in those whose testimony did not corroborate that result. Assuming, however, the equitable right established, as claimed by the agreement, the evidence fails to disclose that it was made effective as a security against any specific property which the court could ascertain and identify, and subject to the lien of such mortgage.

The decree must be affirmed.

[Filed May 3, 1889.]**WHITNEY, APPELLANT, v. BLACKBURN, RESPONDENT.**

ELECTION CONTEST — LAWS FOR — SUMMARY. — The intention of the contested election laws is to furnish a summary remedy and to secure a speedy trial, that the title to the office in dispute may be determined before the official term expires in whole or in large part, and that the will of the people may not be defeated in the choice of their officers.

ID. — FOUNDATION OF SUIT — WHAT IS. — In proceedings of this kind, the notice of contest is the foundation of the suit, and performs the double office of a summons and complaint, and should contain the title of the cause, specifying the name of the court and the parties to the contest, and must be served and filed within thirty days.

PROCESS, WHAT IS — SERVICE ON LEGAL HOLIDAY, EFFECT OF. — Service of process upon a legal holiday is irregular, and may be pleaded in abatement, or set aside on motion, but a notice of contest, like a summons, is not technically "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer it within a specified time.

ELECTION CONTEST — STATEMENT OF — CAUSE OF. — "Stating the cause of such contest briefly," is stating briefly the facts or combination of facts which give rise to the right of contest, and this necessarily implies that such fact shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested.

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LD. — NOTICE OF — ITS PURPOSE. — As the object of the notice is to inform the other party of the substance of the facts relied upon to defeat his claim, certainty is required, but not technical precision of averment, and when the words used therein, taken in their ordinary sense, fairly serve this purpose, it is sufficient.

STATUTE LAW — HOW CONSTRUED. — While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the statute concerning contested elections that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which such other has been declared elected, by a tribunal authorized by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty so to notify and inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry.

APPEAL from Linn County.

J. J. Whitney, by himself.

D. R. N. Blackburn, by himself.

LORD, J. — This was a proceeding begun under title 4, chapter 14, sections 2544-2548, Oregon Code, to contest the right of the defendant to the office of county judge of Linn County, to which he was declared elected by the board of canvassers.

The election was held on the fourth day of June, 1888, and the notice was served on the fourth day of July, 1888, by the sheriff of that county, but the notice of such contest was not filed in court until the twenty-third day of August, 1888, and the next regular term of the court beginning on the twenty-second day of October, 1888, was the time named in the notice for hearing such contest. On the first day of such term, the defendant filed a motion to dismiss the same for the following reasons: 1. The court has not obtained jurisdiction of said contest, or of the person of respondent; 2. Said notice is not entitled in any court; 3. It is not entitled in any proceeding, nor are there any parties thereto; 4. It has not been served

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on respondent in the manner and within the time prescribed by law; 5. No notice of contest has been legally served on respondents; 6. Said pretended service is illegal; 7. Said pretended notice and the pretended service thereof were not filed in this court within the time prescribed by law; 8. No complaint or other paper has been filed which respondent could be called upon to answer. The court sustained the motion, and dismissed the notice of contest.

It appears that no leave was asked to amend or to serve an amended notice, presumably for the reason that the plaintiff considered the ruling of the court as error, which he would be able to establish on appeal.

Our statute provides as follows: "Any person wishing to contest an election of any person to any county, district, township, or precinct office, may give notice in writing to the person whose election he intends to contest that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected." (Oregon Code, sec. 2544.)

It will be noted that the provision is silent as to the time when the notice of contest shall be filed.

The defendant contends that the notice must not only be served, but must also be filed within thirty days. It was not filed until the twenty-third day of August, nearly fifty days thereafter.

By reference to the cases decided in this court, the practice has been to file the notice within thirty days, and such undoubtedly has been the construction given to the statute by the profession.

In Minnesota there was a like statute, and from which it is supposed our statute was taken, although it may have been from some other state, and the only construction which the courts of that state has ever given to the

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provision (sec. 2544) just cited, which has been brought to our observation, is found in *Waller v. Bancroft*, 4 Minn. 110, wherein Flandrau, J., said: "This proceeding is instituted by the service of a notice by the party desiring to contest, upon the party in possession, within thirty days after the election."

No mention is made when the notice must be filed, yet certainly it must be done within such time as will afford a speedy trial, and carry into effect the will of the people. The "proceeding is instituted," that is, begun by service of notice of contest, but it is not pending in court until filed.

In a proceeding of this kind, the notice serves the double purpose of a summons and complaint. A petition or complaint as soon as filed is pending (*Clendenin v. Allen*, 4 N. H. 387), and the word "pending" implies that the cause is in court. (*Thomas v. Hopkins*, 2 Browne, 146.) Until filed there was no contest pending in the court, but there was notice that the plaintiff intended to bring the defendant before the court at a time stated therein, for the trial of the allegations contained in the notice of contest. That the notice must be filed before that time as specified is not disputed, but the contention is, that the true construction of the provision, alike supported by analogy and the manifest object of the law, requires that the notice must be filed within thirty days.

At common law the original writ contained a general description of the declaration, and by practice in some of the states the declaration was fully set forth in the writ which issued out of the court, properly attested, and was returnable to it. It was a mandatory precept, issued by the authority of and in the name of the sovereign or state, for the purpose of compelling the appearance of the defendant before the court to which it was returnable, that he may there make an answer to the plaintiff's complaint. (*Gould's Pleading*, 14.)

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In some respects the notice of contest is like such writ, for it specifies or sets forth the causes of action, and serves the purpose of a summons to give notice of the intended contest, but it is not an official paper like the writ, issued out of the court or attested by any of its officers, and it does not seem to me to be entitled to have the character of an official paper; or to be considered as a cause of action pending in court until such notice is filed.

In many of the states, in proceedings of this nature, the statutes provide that the notice or petition, or other statement required, must be filed within the time prescribed, and by analogy to the practice under the code which requires the complaint to be filed, etc., more especially as the notice of contest serves the double purpose of a complaint and summons, it would seem to be the better practice, and more in conformity with its usages, to require the notice to be first filed and then delivered to the proper officer for service, which would necessarily exact that it be filed within thirty days. But this has not been the uniform practice; usually the notice is served first, or before filing, but the practice has been, and the record of all the cases show, that the notice has been filed within thirty days. So that, if this section is to be construed according to the practice under it, the analogies which sustain it, and the evident purpose of the law to secure a speedy trial which necessarily demands promptness in commencing and prosecuting the proceedings, then the notice must be filed within thirty days. It certainly was not intended that a contestant should be permitted to cause a notice to be served on the party in possession, and then to pocket or hold back the notice for any length of time he may desire, or suits his whim, or to afford him time to skirmish around to find evidence to support his allegations. There must be some limit

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within which this notice must be filed; and if not within the time allowed to serve the notice, what limit?

If he may keep the notice back fifty days, why not a year, or during the term?

In providing that the judge may sit at chambers and try the contest, it becomes plain that the purpose of the law is to insure a speedy trial, to the end that the choice of the people legally expressed may prevail, and in recognition of this principle, it is the practice of the courts as it is their duty "to speed the cause, so that the official term which is in dispute may not expire either in whole or in large part before the final determination is reached." Until the notice is filed, and the cause is pending in court, the defendant is helpless to do anything in the premises, but is he to be annoyed and menaced by a threatened contest until it shall please the plaintiff to file his notice of contest? What reason is there, when the notice is served, that it should not then be filed? Why keep it back? The cause of contest is stated in it, and no possible injury can come to the plaintiff by filing it, under our system of allowing amendments, and the liberal construction given by the courts to contested election laws in order that the will of the people in the choice of public officers may not be defeated. What reason then can be given for delaying the inquiry until it shall suit the volition of the plaintiff to file his notice. It is not simply a matter of his own private concern, but a matter in which the people have a preponderating interest, and it is their right as well as his duty, when he charges that another holds an office to which he claims to have been elected, to have it speedily determined, and when such is the manifest intention of the law, it will be so construed as to give it that effect. As a result, it follows that our opinion is, that the notice must be served and filed within thirty days, but as this objection is now first raised, and as there

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are others, which would necessarily lead us to the same conclusion which the court below reached, we shall pass this objection with these suggestions for future guidance in such proceedings.

As the notice is the foundation of the action in a proceeding of this kind, and serves the double purpose of both summons and complaint, it should contain "the title of the cause specifying the name of the court and the names of the parties to the action, plaintiff and defendant" (Oregon Code, sec. 66, subd. 1); and "a demand for the relief which the plaintiff claims" (Oregon Code, sec. 66, subd. 3); and perhaps ought to be verified to insure good faith in the averments. Usually this has been the practice, but we are not prepared to say that a verification of the notice of contest is an absolute requirement. But certainly a notice of contest which is a writ containing the declaration, so to speak, ought to specify the name of the court in which the defendant is to appear, and the names of the parties.

The code makes the title of the case a part of the complaint, and as the notice of contest embodies the idea of both summons and complaint, the absence of these requirements is a ground of objection, which, when made, will prevail, unless leave to amend is asked for. The notice in the case at bar is without title,—it does not specify the name of the court or the parties, and asks for no relief, nor is it verified. It is simply addressed to D. R. N. Blackburn, without any caption, and although these objections were pointed out, and the plaintiff could have applied to the court for leave to amend, he chose not to do it, and there was no other alternative for the court than to grant the motion to dismiss. Again, the notice was served on the defendant on the fourth day of July, 1888, a legal holiday (Oregon Code, sec. 3543), which is made a non-judicial day by section 928 of the code.— But the

expression "legal holiday" of itself imports *a dies non juridicus*: *Lampe v. Manning*, 38 Wis. 676; and "this," said Rodney, J., "means only that process cannot ordinarily issue, or be executed or returned, and that courts do not usually sit on that day. (*State v. Ricketts*, 74 N. C. 193; *San Francisco v. McCain*, 50 Cal. 211.) It would seem, then, that service of process upon a legal holiday is clearly irregular, and may be pleaded in abatement, or set aside on motion." (Wade on Notice, sec. 1359; *Cooner v. Jackson*, 50 Ala. 384.)

Upon the assumption that the notice of contest is a process as contended, the service was irregular, and was subject to be set aside on motion. Undoubtedly, one object of the notice of contest, like a summons, is designed to impart notice to the defendant, but it is doubtful whether it may be considered process in the technical sense, when even a summons is not process in the sense that requires it to run in the name of the state. (*Bailey v. Williams*, 6 Or. 71.)

Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under our code, the summons is the process used to commence a civil action, but technically such a summons is not "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer the complaint therein within a specified time. In view of this distinction, the notice cannot be considered "process" in the sense in which that word is used in the books.

It is further objected that the notice or paper filed is not such as calls upon or requires the defendant to answer it, and several reasons are assigned therefor. There is no question but that the notice, or the complaint part

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of it, is singularly defective, and omits much that is essential and indispensable to be alleged. Nor is the cause of such contest sufficiently or otherwise stated, so as to apprise the adverse party of the grounds of such contest, and enable him to be prepared to meet them. In a proceeding of this kind the notice of contest supplies the place of a complaint in an ordinary action. The code requires that the complaint should contain a plain and concise statement of the facts, and a demand for the relief claimed. (Oregon Code, sec. 66.) The statute for contested election requires that the person wishing to contest "may give notice in writing to the person whose election he intends to contest that his election will be contested, *stating the cause of such contest briefly*," etc. The "cause" of such contest is his cause of action,—the wrong committed. It is the fact or combination of facts which give rise to his right of contest or of action, as the case may be. In the complaint these are to be plainly and concisely stated, and in the notice briefly stated. But in either case the facts must be stated. To state them briefly necessarily implies that they shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested.

It is no doubt true that upon the question as to the certainty required in stating the ground of a contest, the courts in the different states vary in opinion, but this in some measure may be accounted for by the difference in the statutes and the courts in which such contest is to be tried.

In respect to this phase of the subject, Mr. McCrary says: "Undoubtedly, the same rule should be applied to a pleading of this character that is applied to all other similar pleadings. It should state in a legal, logical form the facts which constitute a ground of complaint; nothing more is required; nothing less will suffice." (McCrary on Elections, sec. 405.)

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In some of the states the rule is to require certainty to a common intent, while in others a much less degree of strictness is required.

In *Election Cases*, 65 Pa. St., Agnew, J., said: "The general rule in all pleadings is, that certainty to a common intent is all that is required. (Heard's *Stephen's Pleading*, 380.) The early decisions in this city were too stringent."

A much truer exposition of the law, and one to be adhered to, is found in the opinion of the late Judge Thompson, in *Mann v. Cassidy*, 1 Brewst. 26, 27. As remarked by him: "The rule must not be held so strictly as to afford protection to fraud by which the will of the people will be set at naught, nor so loosely as to permit the acts of sworn officers, chosen by the people, to be inquired into without adequate and well-defined cause." An interesting note upon this subject may be found in the *Am. & Eng. Ency. of Law*, p. 406.

Under our statute, by its meaning as well as by parity of reasoning, "stating the cause of such contest briefly" means stating the facts which give rise to the right to contest, or constituting the grounds of such contest. To do this briefly, certainty is required, but not technical precision of averment, and only that degree of certainty in the statement of facts as will serve to notify the adverse party of the particular cause upon which the contest is founded.

As the object of the notice is to inform the other party of the substance of the facts relied upon to defeat his claim, when the words used therein, taken in their ordinary sense, fairly serves this purpose, it is sufficient.

In the case at bar, the learned counsel, while not wholly ignoring some of the defects pointed out in the notice, sought mainly to uphold it upon the authority of *Howard v. Shields*, 16 Ohio, 186, and waiving any expression of

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opinion as to the applicability of the view therein expressed to our statute, a glance at the statement of facts in that case as a test for the case here would be fatal to its sufficiency in many particulars.

The notice of contest in the case at bar proceeds in this wise:—

“NOTICE OF CONTEST OF ELECTION.

“To D. R. N. BLACKBURN: You are hereby notified that your election to the office of county judge of Linn County, Oregon, at the regular June election for the year 1888, in said county and state, will be contested by me for the following reasons:—

1. A great number, to wit, the number of twenty-five or more illegal votes, were cast and counted for you for said office at said election, in each of the precincts of said county; the names of said voters being unknown to me at this time. *Particular specification* of the names of said voters I am unable to give, for the reason I have as yet had no time or *opportunity* to examine the poll-books, or ballots cast at said election.

2. A great many, to wit, the number of twenty-five or more of legal votes were offered for me at said election in each of the precincts of said county for said office, and the *judges* of election excluded said votes, and refused to *receive* or count the same for me; the names of said voters being unknown to me at this time. *A more particular specification* and description of the names of said voters I am unable to give, for the reason I have as yet had no time or *opportunity* to examine the poll-books, or ballots cast at said election.

3. A great number, to wit, twenty-five or more votes were counted for you for said office at said election in each of the precincts of the said county, which were not cast for you; the names of the persons casting said votes being unknown to me at this time. *A more partic-*

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ular specification of the names of said voters I am at this time unable to give, for the reason I have as yet no time or *opportunity* to examine the poll-books, or *ballots* cast at said election," etc.

Without encumbering the record further, it is enough to say that the notice of contest continues to run without abatement to the extent of fourteen counts with the same dead uniformity of general statement, and ends without even a prayer for relief. Nor does it appear by the notice that the plaintiff or contestant was an elector or resident of said county, or even a candidate for the office except by inference, although this last may be immaterial. (*Howard v. Shields*, 16 Ohio, 136; *Rounds v. Smith*, 71 Me. 380; *Nelson v. Lucas*, 43 Mo. 292; *State v. Peniston*, 2 Neb. 100; *State v. Long*, 91 Ind. 351.) Nor that the illegalities so numerous and uniformly charged would have affected the result, or that the contestant received a plurality, or majority of the legal votes cast for the office. (*Harris v. Loomis*, 6 W. Va. 713; *Zerby v. Shase*, 107 Pa. St. 183; *State v. Mason*, 14 La. Ann. 505; *Halstead v. Bader*, 27 W. Va. 306; *Lamer v. Gallatas*, 13 La. Ann. 175; *Sweepstor v. Barton*, 39 Ark. 557.) Nor is there anything in the notice to show that the defendant was a candidate for county judge, or that he was declared elected as such, or that he received a certificate of election, or that he did not receive a majority or plurality of the legal votes actually cast, or that he was not duly and legally elected and entitled to the office. All to be found, except the counts as stated, is the opening statement that the defendant was elected at the regular June election in 1888, and that he intended to contest it. From the facts as set forth, it is manifest that they are not even reasonably or otherwise specific and certain, and that no one could be prepared to meet charges preferred in such a general way, or if any irregularity or illegality in fact did lie concealed

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behind them, to avoid being taken by surprise. The wording of the notice indicates, as was asserted at the argument, that the plaintiff did not know of a single error or illegal vote cast, but stated the facts broadly and generally because he was unable to point out, or to be reasonably specific and certain as to any count in his notice, or as to any irregularity or illegality of whatever kind, upon which to rely, or other fact to sustain his claim. As the plaintiff insisted by his conduct as disclosed by this record in standing by his notice as it was, it is difficult to perceive, in view of all the facts, how the court could do otherwise than sustain the motion.

While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the law that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which he has been declared to be elected, by a tribunal chosen by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry.

The judgment must be affirmed.

Points decided.

[Filed at Pendleton, May 13, 1889.]

BARTON, RESPONDENT, v. LA GRANDE, APPELLANT.

UNDER THE LAWS OF THIS STATE, AN APPEAL FROM A JUDGMENT OF CONVICTION for the violation of a city ordinance, rendered by a tribunal of the city, does not lie unless expressly given by the city charter, or by some statute. Where a right of appeal in such a case is not given, as mentioned, a writ of review will lie to examine the proceedings had on the conviction, in order to ascertain whether or not the tribunal before whom they were had exercised its functions erroneously, or exceeded its jurisdiction to the injury of the plaintiff in the writ. A writ of review in such a case, like a common-law *certiorari*, only brings up the record, which includes the complaint and proceedings had thereon; and no question of fact determined by the tribunal, or any ruling made by it in the admission of evidence upon an issue of fact, can be considered.

A COMPLAINT UNDER A CITY ORDINANCE, which provides that any person or persons who shall be guilty of any violent, riotous, or disorderly conduct, or who shall use profane, abusive, or obscene language, in any street, house, or place within the city, whereby the peace or quiet of the city is or may be disturbed, shall, upon conviction thereof before the recorder, pay a fine, will not be sufficient to constitute an offense under such ordinance, unless it shows that the act was committed in a street, house, or similar place within the city.

THE GENERAL WORD "PLACE," AS USED IN THE ORDINANCE, must be construed to mean a definite locality within the city, of the same kind or nature as a street or house.

IN ACCORDANCE WITH THESE VIEWS, held, that the charter of the city of La Grande in the county of Union, Oregon, does not confer a right of appeal upon a party convicted of a violation of an ordinance of the city, and consequently that a writ of review will lie in such a case. Also, that where the complaint charged that the acts constituting the disorderly conduct prohibited by the ordinance were committed within the city, against its peace and dignity, but did not specify any definite locality therein where they were committed, that the complaint was not sufficient to support a conviction for a violation of such ordinance.

APPEAL from a decision of the Circuit Court for the county of Union, dismissing a writ of review.

C. H. Finn and T. H. Crawford, for Appellant.

J. D. Slater, for Respondent.

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17	577
17	626
19	111
23*	111
22*	116
23*	861

17	577
28	241

17	577
30	309
17	577
34	435

17	577
39	619

17	577
44	61

Opinion of the Court—Thayer, C. J.

THAYER, C. J.—The appellant herein was tried and convicted in the recorder's court of the city of La Grande, for disorderly and riotous conduct.

He was charged in the complaint filed against him as follows: "The said Thomas Barton did, on the nineteenth day of June, 1888, in the city of La Grande, Union County, Oregon, demean and conduct himself in a disorderly manner by then and there wrongfully and unlawfully striking and beating the said G. C. Schlem with the fist of him the said Thomas Barton, contrary to section 1, of ordinance No. 20, series of 1885, 'entitled an ordinance concerning offenses and disorderly conduct,' and approved August 20, 1885, and against the peace and dignity of the city of La Grande, Union County, Oregon."

To this complaint the appellant filed a demurrer, on the grounds that it did not state facts sufficient to constitute a cause of prosecution; also that the court had no jurisdiction, either of the appellant or of the subject-matter. The demurrer having been overruled, the appellant interposed a plea of "not guilty," and of a former acquittal; and upon which plea he was tried, convicted, and sentenced to pay a fine. He then sued out a writ of review from the said circuit court, which having been duly returned, was by said court, upon motion of the respondent's counsel, dismissed; and from that decision this appeal is taken.

The first question to be considered is, whether a writ of review will lie from a conviction in the recorder's court of the city of La Grande, for the violation of a city ordinance. That question depends of course upon whether or not an appeal is allowed in such case by the charter of the city. The respondent's counsel concedes that, unless the charter expressly gives the right of appeal from such a decision, none exists, and that the appellant's remedy would then be by writ of review; that undoubtedly is the law.

The respondent's counsel, however, claims that certain sections of said charter do expressly give such right; and refers us to sections 43 and 44 thereof.

Section 43 reads as follows: "The recorder is the judicial officer of the corporation, and shall hold a court therein, at such places as the council shall provide, which shall be known as the recorder's court," etc.

Section 44 reads: "He shall have jurisdiction of all crimes and offenses defined and made punishable by any ordinance of the city," etc.

He has the authority and jurisdiction of a justice of the peace for the county of Union, within the limits of the city of La Grande, in both civil and criminal matters; and all proceedings in his court shall be governed and regulated by the general laws of the state, applicable to justices of the peace and justices' courts in like or similar cases. "His court," says the counsel, "referred to in section 44, is the recorder's court, provided for in section 43." Conceding that to be true, it does not follow that the right of appeal is given. Because all proceedings in "his court" are to be governed and regulated by the general laws of the state applicable to justices of the peace and justices' courts in like or similar cases, we are not authorized to assume that a right of appeal exists in favor of the parties to the proceeding. Such rights must be conferred by a positive provision of statute.

The proceedings which are to be governed and regulated by the general laws of the state applicable to justices of the peace, etc., as provided in said section 44, are proceedings in the exercise of the recorder's jurisdiction of crimes and offenses defined and made punishable by ordinances of the city; and the right of appeal in favor of parties affected by the exercise of such jurisdiction has no connection therewith whatever. The effect of the clause in the charter referred to is to confer certain jurisdiction upon

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the recorder's court, and to regulate the manner of its exercise; and no inference can be drawn therefrom, as I can discover, that the right of appeal was intended to be given in favor of parties affected by its exercise. When the recorder exercises the authority and jurisdiction of a justice of the peace, under the charter of the city, he is *pro hac vice* a justice of the peace; and the provisions of the justice code, giving a right of appeal from judgments of justices' courts, apply to him the same as to any justice of the peace; but those provisions have no application to his judgments rendered in cases of violation of city ordinances.

The decision in *Town of La Fayette v. Clark*, 9 Or. 226, is decisive of the question of the right of appeal in this case. The doctrine declared in that case is sound, and this court did not intend to depart from it in *City of Corvallis v. Stock*, 12 Or. 391. In the latter case, an appeal had been taken from a judgment of the recorder of the city of Corvallis to the circuit court for the county of Benton, and been sustained by the latter court upon the authority of *Sellers v. Corvallis*, 5 Or. 273, which was directly in point; this court held, in the case last referred to, that the charter of the city of Corvallis gave a right of appeal from judgments rendered by the recorder's court in both classes of cases; and therefore we accepted that construction in *Corvallis v. Stock*, although we would not have given it such a construction if the question were *res nova*. We did not, however, attempt to change the rule announced in *Town of La Fayette v. Clark*, nor do we see any reason for changing it at this time. According to this view, the decision of the circuit court herein, dismissing the writ of review, upon the ground that an appeal was the proper remedy, was erroneous.

It becomes necessary therefore to examine the proceedings had in the recorder's court upon the conviction of

the appellant, in order to ascertain whether or not that court exercised its functions erroneously, or exceeded its jurisdiction to the injury of appellant. The writ of review, like a common-law *certiorari*, merely brings up the record; we cannot consider any question of fact determined by the record, or any ruling made by him in regard to the admissibility of evidence. We have a right to consider the sufficiency of the complaint upon which the prosecution was based, and the regularity of the conviction.

The only question necessary for us to consider in this case is, whether the complaint was sufficient to constitute a violation of the ordinance referred to therein, as we are of the opinion that it was defective, and consequently the recorder had no jurisdiction to render a judgment of conviction against the appellant. The substance of said ordinance is as follows: "That any person or persons who shall be guilty of any violent, riotous, or disorderly conduct, or who shall use any profane, abusive, or obscene language, in any street, home, or place within the city of La Grande, whereby the peace or quiet of the city is, or may be, disturbed," etc., "shall, upon conviction thereof before the recorder, pay a fine," etc. The complaint against the appellant filed with the recorder, as will be seen from an inspection of it, does not charge in what particular place within the city of La Grande the disorderly conduct occurred. The common council of the city evidently did not intend by the ordinance to subject persons to punishment for disorderly conduct unless the peace or quiet of the city was thereby disturbed; and the act, in order to be punishable, must occur in a street, house, or similar place in the city.

The language of the ordinance, that any person or persons who shall be guilty, etc., in any street, house, or place within the city, whereby the peace or quiet of the city is

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or may be disturbed, is qualifying in its terms; it implies that the person must be guilty under the circumstances mentioned; the charge therefore, in order to be sufficient, must show that the act was not only committed, but committed under the circumstances rendering it penal. The counsel for the respondent claims that the terms "street," "house," or "place," imply that the act would be punishable as an offense if committed anywhere in the city, and consequently it need not be alleged in the complaint in what particular place in the city it was committed. But it is a rule of construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of the like nature and quality. (Rapalje's and Lawrence's Law Dictionary, title *Ejusdem Generis*.) The word "place," therefore, as used in the ordinance, implies a particular place of similar character to a street or home.

There are two obvious reasons why the complaint in such a case should set out the particular locality within the city where the act was committed; one of which is, that the accused may be definitely informed as to the charge; and the other is to show that it was committed in such a locality or place that it would be liable to disturb the peace and quiet of the city; and unless the complaint does show such fact, it does not state facts sufficient to constitute an offense under the said ordinance.

The order and judgment of the said circuit court appealed from will therefore be reversed, and the case remanded to that court, with directions to reverse the judgment and conviction of the said recorder's court, sought to be reviewed under the said writ of review; and the appellant will be entitled to his costs and disbursements herein.

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[Filed May 12, 1889.]

ROBERTS v. PARRISH.

PRACTICE—DEPOSITION BY PARTY IN HIS OWN BEHALF—WITNESS.—A person who is a party to an action is also a competent witness therein, and his deposition may be taken in his own behalf in any of the cases specified in section 814, Hill's Code, applicable to the circumstances or condition of such witness.

DEPOSITIONS TAKEN BY ADVERSE PARTY.—Subdivision 1, section 814, Hill's Code, confers the power and authority on either party to an action or proceeding to take the deposition of "the adverse party." It confers a right that has no existence outside of this statute, but it in no manner restricts the right of either party to take the deposition of any witness in the cases enumerated in the section.

DEPOSITION—BILL OF EXCEPTIONS.—The recital in the bill of exceptions that a certain deposition is made part of it is ineffectual for any purpose, unless such deposition is annexed to the bill of exceptions, and in some manner marked or identified as an exhibit.

MOTION FOR NONSUIT—BILL OF EXCEPTIONS—EVIDENCE.—Unless the bill of exceptions shows upon its face that all the evidence before the jury at the time the motion for a nonsuit was made is included therein, this court will not review the action of the court below in overruling such motion.

INSTRUCTIONS NOT WARRANTED BY FACTS.—However correct instructions may be as abstract propositions of law, if they are inapplicable to the facts in evidence in the particular case, they are properly refused.

PROMISSORY NOTE—INDORSAMENT FOR COLLECTION.—The indorsament of a promissory note for collection passes such title to the indorsee as will enable him to sue thereon in his own name, though he paid nothing for such note, but in such case he will hold said note subject to the same defenses that could have been made to it in the hands of the original payee.

APPEAL from Wallowa County.

J. D. Slater, for Respondent.

C. H. Finn, for Appellant.

STRAHAN, J.—The complaint in this case contains three counts. The first is on a negotiable promissory note made by the defendant to Jane Roberts for \$105, dated August 22, 1881, and due one year after date, and indorsed and delivered by the payee to the plaintiff on the twenty-eighth

17	583
18	299
21	146
22*	136
22*	1060
27*	94

17	583
29	146
30	149

17	583
31	148
17	583
33	193
34	506

17	583
35	136

17	583
41	546
17	583
46	146

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day of July, 1881. On this note two payments are alleged: Interest up to June 12, 1884, and twenty-two dollars paid January 22, 1887. The second cause of action is on a non-negotiable note for \$115.50, dated July 15, 1882, payable to Jane Roberts. It is alleged that this note was sold, assigned, and transferred to the plaintiff by the payee on the twenty-eighth day of July, 1887, for a valuable consideration, and it is alleged that the interest had been paid thereon up to June 12, 1884. The third cause of action is on a negotiable promissory note dated October 5, 1881, for \$175, and interest at ten per cent, and due one year after date. It is alleged that the interest was paid on this note up to the twenty-sixth day of December, 1885, and the further sum of \$176.19 paid thereon September 13, 1887.

The answer to the first cause of action denies the indorsement to the plaintiff, and then alleges payment of said note to Jane Roberts before August 1, 1884. The answer to the second cause of action is a denial of the execution of the note therein set out, "except as specially admitted," and then payment is alleged to Jane Roberts on the first day of August, 1884. The execution of the third note is also denied; but the answer is silent as to the payments thereon alleged by the plaintiff. The answer then alleges that on or about June 20, 1884, the defendant paid Jane Roberts, the alleged payee of the first two notes sued on, the sum of \$353 in full of all demands against the defendant and in her favor, including all notes, accounts, and claims then held or owned by said Jane Roberts against him, and set out and mentioned in plaintiff's complaint, and while she was the holder thereof, and in full of all accrued interest thereon, and that she then and there undertook and agreed to cancel the same and all demands alleged and pretended to be transferred by her to the plaintiff. It is then alleged, in substance, that Jane

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Roberts, between the first day of May, 1882, and the thirtieth day of July, 1884, became and was indebted to the defendant in the sum of \$353 for services, board, washing, and pasturage, all of which were furnished to and for her at her special instance and request, and that said Jane agreed and promised to pay the same, which said counterclaim became due and payable prior to the twentieth day of June, 1884, and that the same remains due and payable, except \$108 paid prior to July 2, 1887, and that said Jane agreed to and with defendant that said \$353 and interest should be used in the satisfaction of her claims against the defendant, including all those sued on herein.

Defendant demands judgment for costs, and that the notes mentioned in complaint be canceled and declared satisfied and delivered to the defendant. The reply denies the new matter in the answer. A trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$153.50, from which judgment the defendant has appealed to this court.

The appellant has assigned in his notice of appeal the following errors upon which he intends to rely: 1. Error in the court in allowing the plaintiff's depositions to be read upon the trial; 2. In permitting interrogatories 6, 8, 9, 10, 11, 13, and 14 of the deposition of John Roberts to be read in evidence to the jury, — each of said interrogatories is copied into the notice of appeal under this assignment, but the answers given thereto nowhere appear in the notice; 3. In overruling the appellant's motion for a nonsuit; 4. In refusing to give the jury this instruction: "The jury are instructed that when a deposition is taken *ex parte*, though after notice, and the witness thereafter was not subjected to cross-examination, the language used by him would be suspiciously regarded"; 5. In refusing to give the jury this instruction: "The jury are instructed that when a promissory note is assigned without

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consideration therefor, the assignee takes it as a mere volunteer, and holds it subject to all its infirmities, the same as if he had actual notice of them at the time of the assignment"; 6. In refusing this instruction: "If the jury believe, from the evidence, that the plaintiff, before he purchased said notes, knew, or as an ordinarily prudent man had reason to believe, from circumstances brought to his knowledge before he purchased it, that the defendant had or claimed to have a defense to said note, or to some part of it, then the plaintiff is not an innocent holder of said note, there being evidence of such knowledge offered by the defendant at the trial."; 7. In refusing this instruction: "If the jury believe, from the evidence, that the plaintiff is not an innocent holder of said note, as explained in these instructions, then the defendant is entitled to set up the same defense to it that he could have set up if the suit had been brought by the payee of said notes"; 8. In instructing the jury, in substance, that the indorsement of a note for collection gave the indorsee such title thereto as enabled him to sue thereon in his own name. We will now proceed to notice such of these assignments of error as are deemed important.

1. The first error relied upon by the appellant is the introduction of the deposition of the plaintiff, John Roberts. The testimony of this witness was taken by deposition and offered and admitted on the trial in his own behalf, and the appellant's contention now is, that the plaintiff's deposition could not be taken in his own behalf. This depends upon the construction to be given certain sections of the code. Section 709 defines who is a witness as follows: "Section 709. A witness is a person whose declaration under oath or affirmation is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit." And section 710 authorizes all persons to be witnesses, except

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as otherwise provided in title 3, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others. Therefore, neither parties, nor other persons who have an interest in the event of an action, suit, or proceeding, are excluded, nor those who have been convicted of crime, nor persons on account of their opinions or religious belief. Section 814 of the code provides: "The testimony of a witness, in this state, may be taken by deposition, in an action at law, at any time after the service of a summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein in the following cases: 1. When the witness is a party to the action or proceeding by the adverse party; 2. When the witness's residence is such that he is not obliged to attend in obedience to a subpoena, as provided in section 795; 3. When the witness is about to leave the county and go more than twenty miles beyond the place of trial; 4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend."

There is no doubt that before a deposition can be read, it must have been taken pursuant to some provision of this section, if taken in the state; but I am unable to agree with the appellant's construction that where the witness is a party to the action, his deposition can *only* be taken by the adverse party. The proper construction of these provisions of the code does not seem to be free from difficulty, but I am inclined to the opinion that subdivision 1 of section 814 grants a right to either party to compel his adversary to give his deposition. This right has no existence independent of this statute, and its sole purpose was to declare and secure that right. It was this and some other similar provisions in the code that have rendered bills of discovery absolute, or, at least, that were designed to take their place, and to extend the field of inquiry from suits in equity to actions at law. A person by being a party to

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an action is not deprived of the right to be a *witness*, and the testimony of any *witness* may be taken by deposition in the cases specified in section 814. It does not affirmatively appear from the bill of exceptions under what particular clause of this section the deposition was taken. It is silent on that subject, but we must intend on this appeal, if the plaintiff could give his deposition at all in his own behalf that he did so under some one of the subdivisions of said section. I think therefore that the first assignment of error cannot be sustained. This construction is adopted with the less hesitancy, for the reason it is the one which has been generally accepted and acted upon by the bench and bar in this state ever since the code was enacted, but no reported case can be found wherein this precise question has been considered by this court.

2. The second assignment of error relates to several questions which it is said are contained in the deposition of John Roberts. It cannot be overlooked that the objection is, that the court allowed the questions to be read. The objection does not include the answers to such questions. I think it would be conceded that if the answers to the questions were not read, the questions were harmless, —the questions without the answers could not possibly have injured the appellant. But we do not wish to dispose of this objection on any merely technical ground if it can be avoided. We have therefore endeavored to look into the deposition itself to see what aid might be derived from that source, but find ourselves unable to do so, for the reason the deposition is not made a part of the bill of exceptions. It is true the bill of exceptions recites that the "deposition is made a part of the bill of exceptions," but that alone will not suffice. To become a part of the record, it must be either copied into the bill of exceptions or attached to the same as an exhibit, and marked so that the same may be identified. (*Morrison v. Crawford*, 7 Or.

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472.) What is claimed to be the deposition of the plaintiff in this case is not even attached to the bill of exceptions, but is copied and sent up with a large mass of other useless matter. We cannot therefore determine whether the answers to those questions were prejudicial to the appellant or not.

3. The third assignment of error is equally untenable. Having reached the conclusion that the depositions are no part of the bill of exceptions, we cannot review the ruling of the court in refusing to grant a nonsuit.

4. The fourth assignment of error was not insisted upon in the argument, and will not, therefore, be further noticed, except to say that the instruction asked was properly refused. It was in the nature of a comment on the evidence, which the court could not have properly made. This was evidence which it was the peculiar province of the jury to weigh and consider.

5. The instruction mentioned in the fifth assignment of error was also properly refused. However appropriate in a proper case, it had no application to the facts disclosed by this record. Neither the pleading nor the evidence, so far as appears from the record, point out any infirmities in these notes. There was no claim on the part of the plaintiff that he was protected against any defense the defendant could have made against the original payee of the notes, and therefore this instruction was inapplicable. Whatever defense the defendant had was set up in his answer, and was passed upon by the jury. It does not appear that the fact that the notes were sued upon by an indorsee in any manner embarrassed or hindered the defendant in making his defense, and we must therefore hold there was no error in refusing this instruction.

6. The same remarks dispose of the sixth and seventh assignments of error.

7. The eighth assignment of error presents the question

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whether or not the indorsement of a promissory note for the purposes of collection passes such title as enables the indorsee to sue thereon in his own name, and we are of the opinion that it does. (2 Randolph on Commercial Paper, secs. 726, 735; Van Santvoerd's Pleading, 115.) The latter authority thus states the principle: "The holder of a promissory note is presumed to be the owner and real party in interest within the meaning of the code. The production of the note and proof of signature of the maker and indorser is sufficient, without showing value given, even though the note was received after due."

It follows that the judgment of the court below must be affirmed.

17 590
189 236

[Filed at Pendleton, May 14, 1899.]

JASPER, RESPONDENT, v. JASPER, APPELLANT.

A WILL IS DEFINED TO BE THE LEGAL DECLARATION of a man's intention which he wills to be performed after his death.

IN CONSTRUING WILLS, THE RULE IS, THAT THE INTENTION MUST GOVERN, provided it be consistent with law; but in ascertaining what the intention is, the words used are to be taken according to their meaning, as gathered from the consideration of the whole instrument and a comparison of its various parts; and this is often aided by extrinsic circumstances surrounding its execution, in revealing more clearly the motive or intention which may be reasonably supposed to have influenced the testator in the disposition of his property.

WHERE A WILL PROVIDED THAT, AFTER THE PAYMENT OF THE DEBTS AND LEGACIES SPECIFIED, the residue of all the testator's property was to be held in trust for a certain period, and out of the rents and profits to be collected therefrom the executors were to pay to the widow such sum or sums as may be necessary for the support of such widow and the support and education of the minor children, and the county court, before such debts were paid, and while the estate was still unsettled, ordered the executors to pay a certain sum for such support and maintenance: *Held*, that as under the will the executors were not to pay such sum or sums for that purpose until the residue was ascertained and the trust invested, the court was not authorized to make the order. *Held further* (by Lord, J., Thayer, C. J., concurring), that the duty to pay debts and legacies was

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strictly executorial, and that when this was done, and the property taken on trust for the purpose specified, the executors became trustees exclusively, and the jurisdiction thereafter was in equity.

T. H. Crawford and R. Eakin, for Respondent.

J. D. Slater, for Appellant.

LORD, J.—This is an appeal from the order of the county court of Union County, making certain allowances under a will of M. Jasper, of that county, for the support and maintenance of his wife and two minor children, which the defendant, as executor, did not fully comply with, and upon a subsequent petition, citation was issued for him to show cause why the order had not been obeyed, etc. Briefly, the facts are these: M. Jasper died April 9, 1865, leaving a will, which was duly probated, and in which he named as executor W. R. Jasper and George G. Gray. On petition, W. R. Jasper was appointed sole executor of the will. Subsequently, the plaintiff filed her petition, setting forth that she was the widow of M. Jasper, deceased, and that under his will she was entitled to her support and the support of her two minor children, and on July 6, 1887, the county court made an order requiring the defendant, as such executor, to pay to the defendant the sum of six hundred dollars per annum for the year commencing April 9, 1887, for such support and maintenance. The defendant not fully complying with such order, on December '8, 1887, the plaintiff, by petition upon the facts therein stated, prayed that the defendant, as such executor, might be required to show cause why he had not complied with such order. In response to such citation upon such petition, the defendant appeared and demurred, which the court overruled, whereupon he answered, which not proving satisfactory to the court upon the hearing, he was ordered to comply with the original order made herein, etc. An appeal was taken to the circuit court, and the

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order of the county court was affirmed, making the allowances as aforesaid under the will, and from that order or decree of affirmance this appeal is taken.

The question to be determined is, Had the county court jurisdiction to make the order of July 6, 1887, requiring the defendant, as executor of the will of M. Jasper, deceased, to pay to the plaintiff, as his widow, the sum of six hundred dollars per annum for the support and maintenance of herself and children? It is agreed by counsel that the proper determination of this question depends upon the construction to be given to certain clauses in the will of M. Jasper, deceased. The will begins by devising a certain tract of land, known as the Trimble farm, and described therein, to the plaintiff, "to have and to hold the same as long as she remains my widow, or until my two minor children, Frank C. Jasper and Willard Jasper shall reach the age of twenty-one years." There then follows several bequests to his other children of the sum of ten dollars each, and to one of them a certain horse, called Black Hawk.

Now come the provisions under which the support is claimed, and out of which the controversy arises. It is this: "After the payment of my debts and the legacies hereinbefore mentioned and given, I give all the residue of my estate, both real and personal, of every kind and nature, including the remainder in the lands hereinbefore mentioned, as given and bequeathed to Emily Jane Jasper, after the termination of her said estate in said lands, to my executors, to hold and to keep and collect the rents and profits of said property until my two minor children, Frank C. Jasper and Willard Jasper, shall reach the age of twenty-one years; and my executors shall pay out of the income from my said property to Emily Jane Jasper, yearly, such sum or sums as may be necessary for the support and maintenance of said Emily Jane Jasper, and

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the education and support of my two minor children, Frank C. Jasper and Willard Jasper, as long as said Emily Jane Jasper remains my widow, or until the two minor children, Frank C. Jasper and Willard Jasper, become of age; and to pay such sum or sums as may be necessary for the education and support of said minors in case of the death or marriage of Emily Jane Jasper, until the minors have reached the age of twenty-one years; and to pay out of the income of said property to Nancy Catherine Jasper, yearly, such sum or sums as may be necessary for her support and maintenance as long as she remains unmarried, or until the two minor children hereinbefore mentioned have reached the age of twenty-one years. When my two minor children, Frank C. Jasper and Willard Jasper, whose ages are now respectively eight and six years, reach the age of twenty-one years, or in case of the death of either, when the other arrives at that age, or in case both die before reaching that age, then at the death of both, my executors are to divide the residue and remainder of all my property and estate between all my children and my wife, Emily Jane Jasper, share and share alike, if my said wife shall be living at the time of the division of said property. And I hereby appoint as the executors of this my last will and testament William Robert Jasper and George G. Gray. And it is my request and instruction that said executors sell and dispose of the property placed in their hands by this instrument when it is to the best interests of the estate to do so, and it is my further request that the lands known as the Reeves place be held until the final distribution of my estate, etc."

In construing wills, the principle is familiar and well understood that the intention must govern. A will is defined to be "the legal declaration of a man's intention which he wills to be performed after his death." (2 Bla.

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Com. 499.) And Chief Justice Marshall said: "The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." (*Smith v. Bell*, 5 Pet. 68.) To ascertain what the intention is, we must take the words used according to their meaning, as gathered from a consideration of the whole instrument and a comparison of its various points. And this is often aided by extrinsic circumstances surrounding its execution, and showing the situation of the parties, whereby light is thrown on the motive or the intention which may be reasonably supposed to have influenced the testator in the disposition of his property.

In the case at bar, however, we are confined solely to a construction of the instrument according to the words used, viewed as a whole, as the record discloses no extrinsic facts by which the language of the will in the discovery of its meaning can be aided. Nor can much assistance be gained by decided cases, so diverse are the terms of such instrument, and so varying are the facts in which they originate. So that it has been well and truly said that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point and agree in every circumstance, it will have little or no weight with the court, who will always look upon the intention of the testator as the pole-star to guide them in the construction of wills. (*Smith v. Bell*, *supra*.)

Now, turning to the will, let us ascertain, from an examination of it, when it is that the executors are required to pay out of the income of the testator's property such sum or sums as may be necessary to furnish a support to the plaintiff and the minor children; for until that duty is devolved upon the executors by the will, no court is au-

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thorized to require its payment, and if it does so, its order is a nullity. Preliminarily, it may be said that counsel concur in the construction of the will that, after the payment of the debts and legacies, the executors hold the property mentioned in trust for the purposes specified, but they disagree as to the character or capacity in which they hold the same in trust.

By reference to the provisions of the will already referred to, it will be observed that it is "after the payment of my debts, and the legacies *hereinbefore mentioned and given*," that the testator gives all the residue of his property, both real and personal, to his executors. It is only when the executors have paid his debts and these legacies before mentioned that the residue can be ascertained, which is, by the terms of the will, to be vested in trust in his executors for the purposes specified; and the legacies here referred to cannot mean any legacies or charges which are to be paid out of the income of the residue of his property which such executors are to hold in trust. When these are paid,—the debts and legacies before mentioned,—whatever else is fastened on the residue of the property with which the executors are invested, and to be paid out of it on its income, only commences when such residue is ascertained, or, in other words, "after the payment of the debts and the legacies before mentioned." This must be so, not only according to the natural order of things, but according to the plain language of the will so far as we have gone. Now, what is the object of putting this residue of his property in trust in the executors of his nomination, so far as it relates to the purposes we are considering?

The will says that the testator gives the residue of his property, both real and personal, to his executors, "to hold and keep, and to collect the rents and profits of said property" until the minor children, whose ages then were

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respectively six and eight years, shall reach the age of twenty-one years, and that "my executors shall pay out of the income from my said property [now the residue] to Emily Jane Jasper [the plaintiff], yearly, such sum or sums as may be necessary for the maintenance and support of said Emily Jane Jasper, and the education and support of my two minor children," etc. Plainly, the object of this trust for the time specified, so far as it relates to the plaintiff, was to enable the executors to carry out the intention of the testator in her behalf, by providing them with the necessary means to furnish the support and maintenance his will contemplated. As it is only the residue of the estate, both real and personal, which the executor takes in trust under the terms of the will, and from which they are then authorized to collect the rents and profits, it can only be out of the income derived from such rents and profits, and collected from such property so held, that the executors can pay such sum or sums as may be necessary for the support of the plaintiff and the support and education of the minor children. It must be manifest, then, that the support and maintenance intended by the testator to be given to his wife and minor children during the period of the trust declared in the will could not be paid until the residue was ascertained by the payment of the debts and legacies specified. The subject-matter, while it may have existed, was not tangible as such, and capable of being made effective in carrying out the intention of the testator, until the debts and legacies were paid and the residue of the property ascertained, out of which the income was to be derived to furnish the support and maintenance given by the will.

As the record discloses that the debts were not paid, and the estate is still unsettled, it necessarily results that the residue of the estate to be held in trust is not definitely ascertained from which such income is to be de-

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rived, and, according to the terms of the will, to be paid by the executors to the plaintiff in such sum or sums as may be necessary for such support and education as specified, and, consequently, that the time for its payment had not yet arrived when the order was made, and that such order was therefore prematurely made and cannot be upheld. But while we all agree that no court, under the terms of the will, would be authorized to make such order until the debts and legacies before mentioned are paid, and necessarily in the result reached that the order is nugatory, and must be reversed, yet we disagree as to the capacity in which such executors held such property in trust, and the court which is to exercise control over them after such residue is ascertained.

It is the opinion of the writer that when the residue of the property is taken in trust, the executors, although named as such in the will, are testamentary trustees, and the jurisdiction over them, and the estate held in trust by them, belongs exclusively to the equity jurisdiction. According to my view, the duty to pay debts and legacies is strictly executorial, and when this is fully performed or accomplished, and the property is taken in trust by them for the purposes specified, and others thereafter mentioned in the will, they are trustees, and not executors, and subject to equity, and not to probate jurisdiction.

The will clearly contemplates a period of time when there shall be a separation of functions and duties,—when the duties of the executors as such shall end, and when, by reason of the trust invested in them by force of the will, they shall assume exclusively the character of trustees. (*Conklin v. Edgerton*, 21 Wend. 438; *Painter v. Clarke*, 13 Met. 220; *Wills v. Cowper*, 2 Ohio, 124; *Knight v. Loomis*, 30 Me. 204; *Layten v. Davidson*, 95 N. Y. 265; *Smith v. McConnell*, 17 Ill. 135; *Vardeman v. Ross*, 36 Tex. 111; *Greenough v. Wills*, 10 Cush. 576.)

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The language of the will is: "After the payment of my debts, etc., I give all the residue, both real and personal, to my executors," etc. Here are words of direct devise of the legal estate to the executors, who, after performing the duties of the trust confided to them in respect to the plaintiff and minor children, are "to sell and dispose of the property placed in their hands by this instrument, when it is the best interest of the estate to do so," when the time, under the will, for distribution comes.

It results, according to my view, that the county court is without jurisdiction to make any order in the premises, but that when the residue is definitely ascertained, and the trust vested, the duty of collecting the rents and profits, and of paying the sum or sums necessary to support the plaintiff and the minor children, is devolved upon the holders of the trust,—the trustees,—and the jurisdiction over the estate so held in trust and of the trustees is wholly of equity cognizance.

It is due, however, to say, although there is other provision made in the will for the plaintiff, that the testator evidently contemplated a speedy settlement of his estate by the payment of his debts and the legacies mentioned and bequeathed, so that the residue of the estate from which such support is to come may be definitely ascertained and be devoted to the purposes specified; yet it was indicated at the argument that there had been unnecessary delay, and perhaps neglect, in not settling the estate sooner; but in view of the fact that the widow and children have received certain sums for their support, and that it was needed, it is highly expedient that these debts and legacies, if not paid, be paid at once, and the estate settled, so that the objects of the testator's bounty may receive the proper sum or sums as may be necessary out of the income, but not in excess of it, for their support and maintenance.

The decree is reversed.

Opinion of Strahan, J., concurring.

STRAHAN, J., concurring specially.—I am unable to concur in the conclusion intimated that the county court is without jurisdiction to ascertain the amount of support to be allowed Mrs. Jasper under the will, and to order its payment. It is true, the amount of the allowance must be confined to "income," and cannot be drawn from any other source; still, I have no doubt by the constitution and laws of this state the county courts are vested in such cases with full jurisdiction over the whole matter of wills, and the direction of the payment of bequests and legacies, and that such jurisdiction continues from the grant of letters testamentary until the performance of the last act necessary to a full and complete execution of the will. By article 7, section 12, of the constitution of this state, it is provided: "The county court shall have the jurisdiction pertaining to probate courts and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount or value of five hundred dollars," etc.; and by section 895, Hill's Code, exclusive jurisdiction, in the first instance, is vested in the county courts pertaining to a court of probate, among other things,—1. To take the proof of wills; 2. To grant and revoke letters testamentary of administration and of guardianship; 3. To direct and control the conduct, and settle the accounts, of executors, administrators, and guardians; 4. To direct the payments of debts and legacies and the distribution of the estates of deceased persons. I cannot doubt that the object and effect of this provision of the constitution and the statute cited vested in the several county courts of this state a jurisdiction which is exclusive over all the subjects specified, and that the matter now before the court is one of the subjects of jurisdiction specified therein. The jurisdiction of the court is co-extensive with the trusts; it is to continue as long as the executorship continues; all the

Points decided.

duties imposed by the will are executorial; and the bond given by the executor covers all of his conduct as such, and protects the estate from the time of his qualification until his final discharge, or until the trust is closed. Any other construction destroys the harmony and effectiveness of our probate system, and perpetuates the very evil that its adoption was designed to eradicate. I have not been able to examine the adjudged cases from other states under a constitution and laws similar to our own, for the reason the same are not accessible at this time. I concur in the reversal of the judgment, for the reason that the order for the payment of the amount for support was prematurely made, but think the county court alone will have authority to act in the premises as soon as the time specified in the will shall have arrived for the payment of such sum or sums as may be necessary from the income for the support of the widow and minor children. I may add that I also fully concur in the intimation given in the opinion of my associates that it is the imperative duty of the executor to so administer his trust that the sums payable to the widow for her support and that of the minors shall be available at once.

[Filed at Pendleton, May 18, 1889.]

AMES, APPELLANT, v. UNION COUNTY, RESPONDENT.

WHENEVER IT IS PROPOSED TO APPROPRIATE THE LANDS OF THE CITIZEN TO A PUBLIC USE, the proceeding by which it is to be done must conform to the requirements of the statute, and contain such a description of the lands to be so taken as may be ascertained from the record.

IN A PETITION TO LAY OUT A ROAD, the beginning, the intermediate points, if any, and the termination, must be certain; otherwise, the county court will not acquire jurisdiction.

WHERE THE COURSE OF THE ROAD from the last point to its termination is described as "thence northwesterly," it is not meant that the road must

17	600
d30	343
17	600
36	542
17	600
41	561

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run in a direct line to the point of ending, but that the route of the proposed road will be in a northwesterly direction; and so long as this is preserved by the viewers, though there be some deviation from a direct line, the description is sufficiently certain to give the requisite information to those liable to be affected by its establishment.

T. H. Crawford, for Appellant.

J. W. Shelton and W. M. Ramsey, for Respondent.

LORD, J.—This was a proceeding instituted in the commissioner's court, to lay out and establish a public highway. The court having declared the proposed road to be a public highway, ordered the same to be opened, when the plaintiff sued out a writ of review in the circuit court, which, at its September term ensuing, dismissed the writ, and affirmed the judgment of the lower court. From this judgment the appeal is taken.

The contention of the plaintiff is, that the proceedings under which the highway was located and established are void for want of sufficient description of such highway in the petition. His argument is, that the description is so vague and indefinite as not to afford the means of information to those interested of the manner in which the opening of the road would affect them.

It is no doubt true that whenever it is proposed to appropriate the lands of the citizen to a public use, the proceeding by which it is to be done must conform to the requirements of the statute, and contain such a description of the lands to be so taken as may be ascertained from its record. On general principles, then, it will be conceded that the petition must be sufficiently specific to convey to those interested the information of what is desired,—an all-important part of which is the line of the proposed road or highway, which necessarily includes its beginning, course, and termination; and when from the description thus given, the road can be definitely ascer-

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tained or located from it, the petition is sufficiently certain and specific in this particular for all practical purposes, which is all the law requires. It does not contemplate that the petitioners for a highway must first procure the services of a surveyor, in order to state in the petition the route of the proposed road with technical accuracy or precision. It is a practical affair, and may be done by practical business men.

"The proceeding," says Mr. Mill, "was intended to be practical, so that the common highways of the country might be established without the employment of a corps of scientific men for the purpose, but that the roads might be established by ordinary practical business men." (Mills on Eminent Domain, sec. 277.) Recognizing, then, to the full extent, the strict rule which ought to govern all proceedings of a character which appropriates the lands of the owner to a public use without his consent, the inquiry is, whether the line of the proposed road is described with sufficient certainty in the petition so as to give to those to be affected by it the requisite information, or whether it is so indefinitely done as to be a nullity.

The description is as follows: "A county road in said county, upon the following line or route, to wit: Commencing at what is known as the Clarke cabin, about forty rods west, and about thirty rods north, from the southeast corner of section 6, township 5 south, of range 41 east, of the Willamette meridian, and running thence northeasterly to the northeast corner of said quarter-section; thence northwesterly to the southeast corner of the northeast quarter of section 36, township 4 south, of range 40 east, of the Willamette meridian; thence northwesterly to the northwest corner of the northeast quarter of section 21, township 3 south, of range 40 east, of the Willamette meridian. Said proposed road to run as near as may be on the line of the survey heretofore made by J. W. Kim-

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brell, deputy county surveyor of said county, under an order of this court in the matter of the county road petitioned for by E. Draper *et al.*, the field-notes and plat of which survey were by said Kimbrell filed in the office of the county clerk of said county on the third day of February, 1888, and by said clerk recorded under an order of the county court. The field-notes and plat of which said survey are here referred to as a particular description of said line of said proposed road, and are made a part of this discription."

In the case at bar, the description in both the notice and the petition is the same, so that any defect to which the first would be liable would be equally applicable to the latter.

Our statute provides that all applications for laying out, altering, or locating county roads shall specify "the place of beginning, the intermediate points, if any, and the place of termination of the road." "And these," said Thayer, C. J., "are essential matters in the initiation of such proceeding. The beginning, the intermediate points, and place of termination of the proposed road must be certain; otherwise, the county court will not acquire jurisdiction to lay out or locate it. . . . A county road cannot be laid out unless the petitioners have in mind the distinct points referred to, and so designate them in their petition that a person of ordinary intelligence need not mistake their location. A variance of a few feet in any of the points required by the statute to be certain would be likely to create serious objections to the location of the road; but however that might be, the statute has prescribed the terms and conditions upon which private property can be subjected to a public easement or servitude, and it must be strictly followed; otherwise, the proceedings will be a nullity." (*Woodruff v. Douglas County*, *ante*, p. 314.) It will be noted in the description of the road already given,

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that the two termini—the place of beginning and the termination—are definitely fixed, and may be easily ascertained. Nor is there any objection that these are sufficiently certain and specific.

The point of objection is, that the highway, after leaving the place of beginning and touching two intermediate points, fails to mention or specify any intermediate points in a distance of some ten miles from the last intermediate point to the place of termination. After leaving the last intermediate point, the description runs in this wise. "Thence northwesterly to the northwest corner of the northeast quarter of section 21, township 3 south, range 40 east, of the Willamette meridian." It will be observed that "thence northwesterly" is all the description given from the last intermediate point to the place of termination. No intermediate points are specified, and it is insisted that without them the description is so defective that the line of the road cannot be ascertained, and consequently that notice of the intended road, over whose lands it is actually to be laid, is not given. The termini of the road are certain, and two intermediate points are definitely stated, and the line of the road from the last intermediate point to the place of termination runs in a "northwesterly" direction. When such a course is given, it is not meant that the road must run in a direct line without variation or turning, but that the route of the proposed road will be in a northwesterly direction, and so long as this is preserved, though there be some deviation from a direct line, the description is sufficiently certain to give the requisite information to those liable to be affected by its establishment.

It is argued however because the plat of the road as surveyed and laid out by the viewers, and subsequently adopted and established by order of the court, varies at

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some places from a direct line, although preserving the northwesterly direction, that it was necessary to establish intermediate points at such places, and that the notice and petition should contain them; otherwise, such deviations might be so great as to include lands for the road not within the description, and thereby condemn lands for road purposes without notice.

But this conclusion is not only unwarranted, but the viewers would transcend their duties to lay out a road without the route prayed for in the petition. After the presentation of the petition and proof of notice, etc., the statute makes it the duty of the viewers "to view, survey, and lay out, or alter said road as prayed for in the petition, as near as, in their opinion, a good road can be made at a reasonable expense, taking into consideration the utility, convenience and inconvenience, and expense which will result to individuals as well as to the public if such road shall be established and opened or altered." (Or. Code, sec. 4065.) This has always been understood to mean that the viewers are to keep within the proposed route of the road as prayed for in the petition; they are to lay out the road as near as, in their opinion, it can be done with a due regard to the considerations named in the statute. And while to avoid obstructions, save expenses, and to better accommodate the public, it may be necessary to make some deviations, so long as the road laid out and established is within the course specified in the petition and notice, it is not open to the objection here made. In such case, it is sufficiently certain and specific to give notice to all whose property may be affected by the intended proceeding. To locate the road without the route prayed for in the petition, or to lay out a road not on a line as described and prayed for in the petition, is no legal notice to those on whose lands it is actually laid, nor to the persons and corporations

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whose interests are affected by it. (*Inhabitants etc. v. County Comm'rs*, 12 Bush, 356.) To do this would violate a principle repeatedly declared by this court that the property of the citizen cannot be taken for a public use without notice, or that the notice must contain full information of the intended proceeding. (*Minard v. Douglas County*, 9 Or. 206; *Benton County v. King*, 10 Or. 513.) But the case at bar does not come within that principle. Here the notice and petition was sufficiently specific to give the requisite information, and the road established is within the route described in the petition. In the particular noted, it was not necessary to name intermediate points, for the line of the road as described did not contemplate nor require the establishment of such points to trace its route. It could pursue its course to its termination without them. The description being sufficient in itself to give the requisite information, it is unnecessary to consider whether it could be aided by reference to the survey and field-notes referred to and made a part of such description. As to the proof of the posting of the three notices in the vicinity of the proposed road, which appears in the record, it is clearly competent and sufficient.

The judgment must be affirmed.

[Filed at Pendleton, May 20, 1889.]

C. W. FOSTER AND W. J. VAN SCHUYVER, ASSIGNEES OF J. W. VIRTUE, FOR THE BENEFIT OF CREDITORS, RESPONDENTS, v. J. W. VIRTUE, DANIEL SMITH, HUNG SING, AND LONG BUE, APPELLANTS.

WHERE ONE DEALS WITH THE AGENT of assignees for the benefit of creditors, with full knowledge of the true relation which such agent occupies to the property and the outstanding equities, he does so at his peril.

J. R. Baldwin and E. B. Williams, for Appellants.

M. L. Olmstead, for Respondents.

LORD, J.—This is a suit in equity to restrain the defendants Hung Sing and Long Bue from paying certain moneys due and hereinafter to become due upon a certain writing, to the defendants Virtue and Smith, and also to require the payment of said moneys to the plaintiffs as such assignees, and for a decree compelling the said defendant Smith to pay the sum of four thousand one hundred dollars; with interest, to plaintiffs as assignees aforesaid, and to surrender such writing or bond, and be enjoined and prohibited from collecting or receiving any further proceeds thereon, or in any wise interfering, etc.

The material facts are these: In September, 1875, the defendant Virtue, finding himself unable to pay his debts, made a general assignment of all his property to the plaintiffs for the benefit of all his creditors; that at the time it was supposed, by proper management and expected developments in mining interests, by holding the property for such time as might bring about the best sale of it, the creditors might not only be paid in full, but that some residue might remain for the defendant Virtue. In accordance with this purpose, and to aid the plaintiffs as such assignees, there was appointed by the creditors a

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board or committee composed of three of the creditors, of whom one was the defendant Smith, to advise and assist the plaintiffs in disposing of the assigned property. Virtue, too, in some way, and with the full understanding of all concerned, was constituted an agent to assist in the management of the business, and the disposition of the property, to help bring about this expected or desired result. The Clark Creek property, which is the subject-matter out of which the controversy arises, was included in the general assignment, which, in May, 1879, was, by the defendant Virtue and one Blackland, conveyed to Hartman and Cohen, and subsequently, by deed of the plaintiffs as such assignees, confirmed to them. Hartman and Cohen conveyed the same to the Placer Gold Mining Company, which in turn conveyed it to the defendant Virtue, and Virtue again to one Kline, of Chicago, who conveyed it to the Clark Creek Mining Company. This latter company executed a mortgage to the defendant Virtue for six thousand two hundred dollars, which was a part of the purchase price, and the same not being paid when due, the said property was sold under an attachment,—not by foreclosure proceedings,—and a judgment obtained thereon, and subsequently the defendant Virtue assigned said judgment to the defendant Smith. When execution was issued, the property was sold and bid in by the defendant Smith, who received a sheriff's deed therefor. Thereafter the defendants Virtue and Smith entered into an agreement with the defendants Hung Sing and Long Bue to sell said Clark Creek Mining property to them for the sum of thirteen thousand two hundred dollars, to be paid as specified in the agreement, and upon the completion of said payments to execute and deliver to the defendants Hung Sing and Long Bue a good and sufficient deed to said property. During all these transmutations in relation to this property, the defendant Virtue acted as agent for the assignees.

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The defense of the defendant Smith is, that the defendant Virtue owed him for money advanced while he was permitted to do business for the benefit of the estate in assignment, and that the judgment assigned to him was collateral security for such money, and he asks that the amount so due him the plaintiffs be required to pay, and take said property.

From this brief review of the facts, it will be seen that the main point is, whether at the times of making said advances the defendant Smith had notice or knew that the property belonged to the plaintiffs as assignees, and whether his purchase at the sheriff's sale was in good faith and without notice of the outstanding title, either in law or equity.

The referee found that the defendant Smith understood and knew the relation that the defendant Virtue occupied to this property, and that he bought it in as the agent of the defendant Virtue; that the transactions with the defendants Hung Sing and Long Bue in regard to this property was a fraud upon the rights of the plaintiffs as such assignees, and that Smith ought to account to them for all the moneys he has received under such agreement, and that any balance remaining to be paid under it should be paid to the assignees.

The court while finding that the defendant Virtue's relation to the property was at all times as agent for his assignees,—the plaintiffs,—and that the money or evidence of debt taken by him for the property, as such agent, belongs to the plaintiffs, further finds that the defendant Smith, at the times of making the alleged advances of money, the assignment of the judgment, and the purchase at the sheriff's sale, had no knowledge that the property belonged to the plaintiffs as such assignees, and that he was a purchaser in good faith, and without notice of any outstanding equities or title in law or in equity.

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The evidence shows that the defendant Smith was one of the creditors of the estate in assignment, and that he had been paid out of the property belonging to it; that he was one of the advisory board in the interest of the creditors to aid in the disposing of the estate when it should be deemed advisable, and to the best interests of all concerned; and that during all the time, especially as relates to the transfer of the Clark Creek Mining Company, that he had access to the books of the defendant Virtue, often acted for him in regard to matters connected therewith, and that he could examine them whenever he wanted to, without imputation of wrong-doing.

Without doubt, it is true that during all the times the defendant Virtue's relation to the property was as agent for the plaintiffs, and that all moneys or evidences of debt taken by him for the property was taken as such agent, and belonged to the assignees. The note for six thousand two hundred dollars, secured by mortgage and taken in his own name for the Clark Creek mining property, belonged to the plaintiffs as assignees for the estate in assignment, and when that note fell due and was not paid, and he under a proceeding of attachment and without resort to the security procured a judgment, and assigned that judgment to the defendant, without the knowledge or consent of his assignees, as the evidence shows, such judgment belonged to the plaintiffs, unless the defendant Smith took it without notice of the plaintiffs' equities.

To this point there is little controversy, except as the transactions affect the defendant Smith with notice. In his testimony, the defendant Smith says that the judgment was assigned to him as collateral security for moneys and securities that he had deposited with the defendant Virtue, which he had used in carrying on the business. Of this assignment no record was made; and when execution was issued and the sale made, he bid off

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the property and put it on record, as the sheriff's deed shows, in his own name. Yet his own evidence, as well as that of the defendant Virtue, shows that he bid it off at the request of and as agent for the defendant Virtue. His words are: "Mr. Virtue gave me authority to bid it off. He assigned me the judgment as collateral security." He was then putting himself on record as holding property and owning it when the title in fact belonged to another, according to his own statement; yet when the same is sold to the Chinamen, Virtue joins in the agreement, and when several payments are made by them, amounting to nearly enough to liquidate the amount of his alleged claim, instead of so applying it, it is all paid over to the defendant Virtue with the exception of a small sum.

Why the necessity of making this whole transaction so misleading? Be it remembered that he was one of the advisory committee of the assigned estate, whose duty it was to aid in the disposition of the property to the best interests of the creditors. As such, and while he acted in that capacity, it was his duty to know the property that belonged to it, and that which remained unsold. Such knowledge would seem essential to an intelligent and proper discharge of the functions of the office with which the creditors had intrusted him, and which he had voluntarily accepted and assumed. Especially must this have been so in respect to this property, of which such great expectations were indulged, and which constituted a major part of the estate. At the time, it was understood that Virtue was to act as agent of the estate in assignment, and the defendant Smith knew and understood the reasons for it. He must have known, then, that this Clark Creek mining property was a part of such estate, and the defendant Virtue's relation to it, and that he could not become the legal or equitable owner of it, or of any debt given as a

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part of the purchase price for it, or any judgment obtained upon such debt, or that such judgment could not be assigned to him by Virtue as collateral security, nor could he, by request of Virtue, or otherwise, under an execution upon such judgment, become the rightful owner of it by purchase at the sale by the sheriff.

This result is in accordance with his own admissions. Van Schuyver, one of the plaintiffs, says at the time of his discovery of the agreement with the Chinamen, and the fact that they had been making payments, and that the defendants Virtue and Smith were giving receipts for it, he asked Smith how he came to be signing receipts for this money, and that he replied that "it is my property. I bought it at the sale, and Virtue gave it to me as security for moneys that I have loaned him, or let him have, rather." The plaintiff told him that the matter would have to be adjusted when Mr. Virtue got up, and a day or two afterwards he met Mr. Smith, who said: "Van, I've been thinking over that matter, and I could n't see, myself, how Virtue could give me the property. I know it was assigned to the assignees, and did n't know how he had any right to turn it over to me."

The testimony of Foster is to the same effect. He says: "I think it was about a year ago, or a little more, when Mr. Smith and Mr. Van Schuyver and myself were talking of the transaction, when Mr. Smith remarked that he bid the property off at sheriff's sale, and at the time of the sale he did not stop to think, or did n't take the second thought, as to his relations to the assignees, and to that property; but if he had taken second thought, he would have known that he could not have held the property, or that Virtue had any right to give him that property for what he, Virtue, owed Smith. This conversation was had in my office in Baker City." And to a further inquiry, the witness testified: "Yes; he stated that if he had taken

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second thought he would have known that it was a part of the assigned property."

Nor does the defendant Smith deny the conversation. He recollects some conversation about that time.

In view of the facts of the relation as creditors, and one of the advisory committee, and the evidence of his knowledge of the relations the defendant Virtue occupied as to the property, when it is further considered that the evidence discloses that he was upon intimate and confidential terms with the defendant Virtue,—had access to his books, acted as his clerk, and looked over the accounts of people who came to do business with Virtue,—the conclusion is irresistible that he did know that Virtue was acting as agent for the plaintiffs as assignee, for the benefit of creditors, and that he bid in the property with such knowledge. And when to this the conduct of Smith and Virtue are noted in respect to the devious path of this transaction, we cannot doubt the defendant Smith's knowledge of the true relation of Virtue to this property, and that the agreement of the defendants Virtue and Smith with the defendants Hung Sing and Long Bue in regard to this property operated as a fraud upon the rights of the plaintiffs as assignees for the benefit of creditors.

The evidence shows that the defendants Hung Sing and Long Bue have paid on the agreement for the sale of the Clark Creek mining property, mentioned in the pleadings, the sum of about \$4,000, which has been paid over to the defendant Virtue, except the sum of \$584, retained by the defendant Smith.

As the defendant Virtue was the agent of the plaintiffs, he must account to them as such assignees for the amount he has received, and the defendant Smith must pay over the sum of \$584, the amount received and retained by him; and the defendants Hung Sing and Long Bue, or either of them, are forever enjoined from paying any fur-

Points decided.

ther sum or sums now due or to become due upon such agreement to the defendants Virtue and Smith; and the defendants Virtue and Smith, or either of them, are forever prohibited and enjoined from receiving or collecting any further sum now due or to become due hereafter upon said agreement; and the said defendants Virtue and Smith are commanded and required to surrender and deliver up such agreement and bond and all papers connected therewith to the plaintiffs, and that said property mentioned therein be decreed to belong to the plaintiffs as such assignees, subject to said agreement; and the said plaintiffs as such assignees are required, upon the defendants Hung Sing and Long Bue paying the sums now due and to become due hereafter, according to the terms of such agreement and all other conditions therewith, to make and execute and deliver to the said defendants Hung Sing and Long Bue, a good and sufficient deed as prescribed by the same.

[Filed at Pendleton, May 20, 1889.]

ALBERT HINDMAN, RESPONDENT, v. OREGON RAILWAY AND NAVIGATION COMPANY, APPELLANT.

THE ACT OF 1887, FOUND IN THE CODE OF MISCELLANEOUS LAWS, from and including section 4044 to and including section 4049, which provides, in effect, that a railroad company owning or operating a railroad in this state shall be liable for the value of stock killed, and for reasonable damages for stock injured upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; that in every such action for the recovery of such value for stock so killed, or for damages for such injury for the same, proof of the killing or injury shall of itself be deemed and held to be conclusive evidence of negligence upon the part of the company; that contributory negligence on the part of the plaintiff in such action may be set up as a defense; but that the allowing of stock to run at large upon common unfenced range, or upon inclosed land owned or in the possession of the

17 614
19 328
19 332
19 374
19 393
21 522
22* 116
24* 411
24* 412
24* 414
24* 415
28* 642

17 614
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22* 116
31* 964

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owner of such stock, shall not be deemed or held to be such contributory negligence, — entitles an owner of stock to recover against a railroad company for such killing or injury of the same, by alleging and proving that the company owned or operated the railroad, that its track was unfenced, and that the killing or injury was done on or near the track, by a moving train, engine, or cars upon such track; and it is not necessary, in an action in such a case, for the plaintiff to allege negligence on the part of the company in any form. Fencing the railroad track is not imposed upon the company as a duty, but the track being unfenced is a fact which of itself establishes conclusively that the company was guilty of negligence; and the only defense the company has is to plead contributory negligence upon the part of the plaintiff, or a willful intent on his part to procure the killing or injury to be done. Said act does not, however, relieve the owner from the duty of keeping his stock within reasonable confines. He owes a duty to the public, which requires him to use reasonable efforts to prevent it from going where it will imperil the safety and security of persons and property; and while he is allowed to depasture his horses and cattle upon "the common unfenced range" without being chargeable with contributory negligence in case they are killed or injured as mentioned, yet he is not permitted to turn them out to roam wherever their instincts incline them.

WHERE H., THEREFORE, BROUGHT AN ACTION against the Oregon Railway and Navigation Company, a railroad corporation, for the recovery of the value of a certain bull, which he alleged was killed upon the railroad track of the latter by being run against and over by the company's train of cars at a place where the track was unfenced, and the company filed an answer to the effect that H. knowingly allowed the bull to range at large outside of his inclosure and upon the railroad track; that the bull was so at large in violation of section 3393 of the laws of Oregon; that the animal was there struck and killed by the company's locomotive; and that the killing was the result of the wrongful and unlawful act of H. in so allowing it to so range at large outside of the inclosure of H.: *held*, that it constituted a good defense, whether the bull was at large in violation of said section 3393 of the laws of Oregon or not, that the facts set forth in the answer showed contributory negligence on the part of H., and that the sustaining of the demurrer thereto by the lower court was error.

APPEAL from a judgment of the Circuit Court for the county of Baker.

The respondent herein commenced an action in the justice's court for Baker precinct, Baker County, against the appellant, a private corporation engaged in operating certain railroads in this state, to recover damages. He

Statement of Facts.

alleged in his complaint, in substance, that on the twenty-second day of April, 1888, he was the owner of a certain bull of the value of one hundred dollars; that said bull, without his fault, went upon the track and ground occupied by the appellant's railroad, in said county of Baker, at a certain point where it was wholly unfenced and uninclosed; that the appellant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against and over the said bull, and killed it; for which the respondent demanded judgment for his damages in the sum of one hundred dollars and costs. The appellant filed an answer to the complaint, denying, upon information and belief, the value of the bull; denying that he went upon the track or grounds occupied by the appellant's railroad without the fault of respondent, but alleged that he went there through his fault and negligence; denied that, by its agents or servants, or at all, it carelessly or negligently ran or managed said locomotives or cars, or that it managed or ran them so carelessly or negligently that the same ran against or over said bull, or killed it; denied that it, by its agents or servants or otherwise, disregarded its duty in respect to its management of said locomotives or cars; denied that by reason of any careless or negligent act of appellant, respondent had been damaged in any sum. The appellant, for a further and separate defense, alleged that the respondent, being the owner of the said bull, knowingly allowed it to range at large out of his inclosure, out and upon the said tracks of appellant, at a time in the complaint stated, in violation of the provisions of section 3393 of the laws of Oregon, when said bull was struck and killed by its said locomotive; and alleged that said killing was due to the said wrongful act and conduct of the respondent, in so knowingly allowing said bull to so range at large out of

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his inclosure. The respondent demurred to the new matter of defense set forth in the answer, upon the ground that it did not constitute a defense to the cause of action stated in the complaint, which demurrer the court sustained. The action was tried before the justice, who rendered a judgment therein in favor of the respondent and against the appellant for the sum claimed in the complaint and the costs of the action. The appellant took an appeal from the judgment of the justice to said circuit court. The demurrer to the matter of defense set forth in the answer, having been argued by counsel in the circuit court, was sustained by said court, whereupon the issue of fact joined in the action by the said pleadings, aside from the part of the answer so demurred to, were thereupon tried by a jury, who returned a verdict for the respondent for the sum of \$37.50, upon which the judgment appealed from to this court was entered.

Rufus Mallory, for Appellant.

C. W. Manville, for Respondent.

THAYER, C. J.—It appears from the bill of exceptions settled and signed by the circuit judge, and filed with the transcript in the case, that the bull in question, being upon the appellant's railroad track, was run over and killed by its train of cars that were regularly running upon its road. It does not appear, nor is it claimed by the respondent's counsel, that the appellant's agents or servants who were operating the train at the time of the casualty were guilty of any negligence in its management. The train was a freight train consisting of about twenty cars; it was on a down grade, when the bull and two steers were discovered upon the track, and those having control of it evidently did all in their power to avoid running over the animals; the two steers ran off the track,

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but the bull staid on it until struck by the locomotive. The consequence resulted very seriously; the engine and some of the cars were thrown off the track, and the engineer and fireman both killed. The value of the bull, as compared to the destruction of property and loss of life in consequence of his being upon the railroad track, where the respondent had no right to suffer him to be, whether it was fenced or not, is very slight and inconsiderable.

The bill of exceptions shows that the appellant's railroad track was not fenced at the place where the bull was on the same when run over; and the counsel for the respondent bases his right to a recovery in the action upon that fact. The liability of a railroad company for killing or injuring cattle upon its track arose heretofore out of negligence committed by the company in consequence of which the injury was done.

There could be no recovery in such a case without an allegation and proof that the company was guilty of violating some duty it owed to the public, and that the injury and damage complained of resulted from its failure to perform it, and a recovery could not then be had if it appeared that the plaintiff was also guilty of negligence which contributed to the injury.

An owner of cattle who allowed them to run at large and stray upon a railroad track was formerly deemed guilty of such a degree of negligence as would defeat his right to recover in consequence of their being run over and killed, unless he could show that the agents and servants of the company acted wantonly, willfully, or recklessly in the affair. Permitting stock to go at large and stray upon a railroad track, where they would be liable to throw a train of cars off the track, and kill and injure passengers and destroy property, was regarded as gross neglect upon the part of such owner.

The legislature, however, has somewhat innovated upon

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that rule, by adopting the provisions contained in sections 4044 and 4048 of the Code of Miscellaneous Laws of Oregon. These two sections, taken together, provide, in effect, that a railroad company shall be liable for the value of stock killed, and for reasonable damages when injured, upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; and that in every action for the recovery of such value for stock so killed, or for damages for such injury to the same, the proof of the killing or injury shall of itself be deemed and held to be conclusive evidence of negligence upon the part of the company; but contributory negligence on the part of the plaintiff in such action may be set up as a defense. The allowing of stock to run at large, however, upon common unfenced range, or upon inclosed land owned or in possession of the owner of such stock, shall not be deemed or held to be such contributory negligence; and, in any such action, proof of willful intent on the part of the plaintiff to procure the killing or injury of any such stock in the manner aforesaid shall defeat the recovery. Under these provisions, it would seem that a plaintiff is entitled to recover against a railroad company for the killing or injury of his stock, by alleging and proving that the company owned or operated the railroad; that its track was unfenced; and that the plaintiff's cattle or horses were killed or injured, as the case might be, on or near the track, by a moving train, engine, or cars upon such track; that the company will be able to defeat the recovery by proof of contributory negligence on the part of the plaintiff; but that allowing the animals to run at large upon common unfenced range, or upon inclosed land owned or in possession of the owner of such animals, will not be deemed or held to be such contributory negligence.

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The statute makes the killing or injury of stock in such case conclusive evidence of negligence upon the part of the railroad company, and I do not see that it is necessary for the plaintiff to allege negligence in any form. Fencing the railroad track is not imposed upon the company as a duty, but it is a fact which of itself establishes conclusively that the company is guilty of negligence; and the only defense left to the company is to plead contributory negligence upon the part of the plaintiff, or a willful intent upon his part to procure the killing or injury.

As to what will constitute contributory negligence in such a case must be determined by the courts. The statute has not attempted to settle that question further than to provide that allowing stock to run at large upon common unfenced range, or upon inclosed lands owned or in possession of the owner of the stock, will not be deemed or held to be such negligence. This clause of the statute must receive a reasonable construction; it must be construed like all innovations upon the rules of the common law. The old law, the mischief which the legislature is supposed to have had in view, and the remedy applied to correct it, must be considered. Enacting a provision that the allowing of stock to run at large upon common unfenced range shall not be deemed or held to be contributory negligence, does not certainly imply that its owner may allow it to roam wherever its propensity may influence it to go uncontrolled and uncared for; and that the owner is entitled to recover its value if it goes upon a railroad track and is run over by a train of cars.

The legislature evidently did not undertake to relieve the owners of horses and cattle from the duty of keeping them within reasonable confines, although turned upon "the common unfenced range." The owners of such stock owe a duty to the public,—the duty of keeping it

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away from localities in which it imperils the security and safety of persons and property. The legislature may not have intended by the act that such owners should employ herdsmen to constantly attend upon their stock and keep it within definite bounds, nor did it intend to permit them to turn their stock out to wander over the country generally. Where the owner exercises proper care in such cases to keep his horses and cattle within reasonable limits, and away from unfenced railroads, and they escape from his control, and go upon the track thereof, and are run over by "any moving train, engine, or cars," it could not be claimed that he was guilty of contributory negligence; but, on the other hand, if he allowed such animals to range wherever their instincts inclined them, and knowingly permitted them to go upon said railroad tracks, he would, in my opinion, be guilty of such a degree of negligence as would preclude his right of recovery for their value if run over and killed by rail-cars.

If I am correct in this view, then the defense of new matter set up by the appellant was a good defense, whether the bull in question was at large in violation of said section 3393 of the laws of Oregon or not. It was sufficient that the respondent knowingly allowed the brute to range at large outside of the inclosure, and upon the appellant's railroad track, to defeat the alleged right of action; it was clearly contributory negligence. A railroad company is doubtless liable, under the statute, for running its cars over cattle which go upon the track without the owner's fault, where the track is unfenced, as where the cattle escape from the range or from the inclosure where they are kept; but it certainly cannot be held liable for so running over them where the owner knowingly allows them to range upon the track, unless the conduct of the agents or managers of the train has been wanton or reckless in the affair. Knowingly allowing the cattle to range upon

Points decided.

the track, where they necessarily expose the lives and safety of the traveling public to constant danger, is, according to my notion, the highest degree of negligence upon the part of the owner, and should be regarded as contributory to the injury. The justice of the peace and the circuit court, in sustaining the demurrer to the new matter of defense set up in the answer, committed error, for which the judgment appealed from must be reversed; and as the case stands, this decision is conclusive against the respondent's right of recovery therein.

The facts set forth in the answer as a defense may not be true, but the respondent, by demurring thereto, admitted their truth. The circuit court, as I understand the rule, had no alternative but to sustain the demurrer, or to determine the case in favor of the appellant, as that court, upon appeal from the judgment of a justice's court, has no discretion except to try the case upon the issues as made up in the justice's court.

The case, therefore, has to be remanded to the said circuit court, with directions to overrule the demurrer to the answer and render judgment upon the pleadings in favor of the appellant for costs, and that the respondent take nothing by his complaint.

[Filed at Pendleton, May 18, 1889.]

C. C. CUNNINGHAM, APPELLANT, v. T. W. BERRY,
RECORDER OF MILTON CITY, AND MILTON CITY,
RESPONDENT.

IN A COMPLAINT AGAINST A PARTY CHARGING HIM WITH AN OFFENSE for an alleged violation of a city ordinance, made before a city tribunal authorized to take cognizance of such matters, the facts constituting the offense must be set out in the complaint as fully and completely as they are required to be stated in an indictment for a similar offense against the state.

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IN A COMPLAINT CHARGING THE DEFENDANT WITH HAVING SOLD WHISKY in Milton City in less quantities than one quart, and which complaint contained a statement that the selling was contrary to the force and effect of a certain section of a certain ordinance approved by its board of trustees, but did not contain any allegations or charge that the defendant sold the whisky without having first obtained a license, agreeably to the provisions of the ordinance: *held*, that the complaint did not state facts sufficient to constitute an offense. *Held, also*, that the charter of said city, within the rule laid down by this court in *Barton v. City of La Grande*, decided at the present term thereof, did not authorize an appeal from a judgment of conviction rendered by the recorder of the city, and that consequently a writ of review was the proper remedy to revise such judgment.

APPEAL from a decision of the Circuit Court for the county of Umatilla dismissing a writ of review to the recorder of Milton City.

The facts of the case appear in the opinion of the court.

Wirt Minor and *L. B. Cox*, for Appellant.

E. D. McLaughlin, for Respondent.

THAYER, C. J.—The appellant herein was tried and convicted in the recorder's court of Milton City, county of Umatilla, Oregon, for an alleged violation of a city ordinance of said city.

The complaint under which he was convicted contained the following charge, in substance: "That the appellant did sell, dispose of, and convey to one L. B. Banks one bottle of whisky of a less quantity than one quart. The said selling, disposing, and conveying being and is contrary to the force and effect of section 8, ordinance numbered 3, of said Milton City, entitled 'An ordinance to regulate and license the sale of spirituous and malt liquors,' said ordinance being approved by the board of trustees of said Milton City on the tenth day of January, A. D. 1888. All of which is contrary to the peace and dignity of the people of Milton, and contrary to the ordinance in such case made and provided."

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The appellant, upon being arrested, and taken before the said recorder upon the said complaint, filed a motion to dismiss the proceeding upon the ground that the alleged ordinance he was accused of having violated was void; that it failed to show that it was published as required by the charter. The motion having been overruled, the appellant filed a demurrer to the said complaint, upon the grounds that the facts contained therein did not constitute a crime. The demurrer was also overruled, and the appellant then interposed a plea of not guilty; whereupon a jury trial was had, and the appellant was found guilty, and sentenced to pay a fine of one hundred dollars and costs. He then sued out the writ of review from said circuit court to review the judgment of conviction and proceedings had thereon; which said writ, after being returned, the said circuit court dismissed, upon the ground that an appeal would lie from said judgment, and consequently that the writ of review would not lie. From the last-mentioned decision this appeal is taken. The complaint upon which the conviction was had was not sufficient.

A complaint in such a case must set out the facts constituting the offense as fully and completely as they are required to be set out in an indictment for a similar offense against the state. It must show that the party accused committed the acts which the ordinance prohibited. It should have shown in this case, not only that the appellant sold the whisky, but that he did so without having first obtained a license agreeably to the provisions of the ordinance, and the time of the passage of the ordinance, and the provisions of it should have been recited in the complaint. The ordinance also has to be proved where the commission of the offense is denied by a plea of not guilty. It must be signed by the mayor, after being passed by the board, or in case of his absence from the meeting at which it was passed, then

by the chairman thereof (section 3, article 6, of the charter), and must be proved to have been passed by the board of trustees, signed by the mayor or chairman of the board as mentioned, attested and published as prescribed in the charter, or by certified copies thereof under the hand of the recorder and seal of the city. (Section 9, article 5, of the charter.) City officials should understand that a person cannot be arrested, fined, and imprisoned under a city ordinance unless it was regularly passed, and had gone into effect at the time of its alleged violation, and that the proceeding under it must be duly and regularly taken.

Whether an appeal will lie from such a judgment of conviction as the one herein depends upon the charter of the city. We have already passed upon that question at this term of court, in *Barton v. City of La Grande*. I have examined this charter, and am not able to find any provision therein which authorizes an appeal in such a case. A writ of review, therefore, was the only remedy the appellant was entitled to invoke, and the circuit court should have sustained the one issued in this case. The circuit court, however, seems to have been misled by a former decision of this court, which is referred to and explained in *Barton v. City of La Grande*, and to have been under the impression that our holding in the former case was different from what we intended.

The decision of the circuit court must be reversed, and the case remanded to that court, with directions to reverse the judgment of conviction rendered by the recorder's court, which was sought to be reviewed, and the appellant will be entitled to his costs and disbursements herein.

Points decided.

[Filed June 20, 1889.]

R. McDONALD, APPELLANT, v. THE AMERICAN MORTGAGE COMPANY OF SCOTLAND, LIMITED, RESPONDENT.

FACTS SET FORTH IN AN ANSWER, WHICH, IN EFFECT, ONLY CONTROVERT THE ALLEGATIONS OF A COMPLAINT, may be properly pleaded in connection with a direct denial of the main allegations thereof; and they may be so pleaded by way of confession and avoidance of the cause of action alleged in the complaint, although the denial be of such a character that, if true, would defeat such cause of action. In such case, however, the denial must be special or qualified.

SEPARATE DEFENSES TO A CAUSE OF ACTION ARE NOT INCONSISTENT when they all, taken together, may be true; but when the truth of some of them cannot be maintained without falsifying others, they are inconsistent.

A FURTHER ANSWER BY WAY OF CONFESSION AND AVOIDANCE OF THE MATTERS ALLEGED IN A COMPLAINT is inconsistent with a specific denial thereof; but may properly be pleaded with a special or qualified denial, such as a denial with an *adque hoc*.

WHERE AN ACTION WAS BROUGHT AGAINST the A. M. Co. of S. to recover a claim for work, labor, and services alleged to have been performed for it by a law firm, upon its retainer, and for money paid and agreed to be paid by said firm in the prosecution of its business and at its request; and said A. M. Co., in its answer, denied that it ever retained said law firm, or that said firm ever performed services, or paid out money for it, or that it ever had a contract with said firm, or that it ever promised to pay said firm for any services or money paid out; and for a further answer alleged, in substance, that the services rendered and money expended by said law firm, sought to be recovered in the action, were so rendered and expended for and at the instance and request of a third party under and by virtue of a contract entered into by and between the A. M. Co. and such third party, whereby said third party had agreed, for a certain consideration, to perform the said services and pay the said money, and at its own charge and expense to pay all expenses connected therewith of every nature and description, and to hold the said A. M. Co. harmless against the same; and that the terms of said contract were well known to said law firm when engaged by said third party to perform said services and expend said money: held, that the facts contained in such further answer were not sham, frivolous, or irrelevant, nor inconsistent with the said denial. *Held, also,* that a further answer or defense interposed by the said A. M. Co., in the said action, wherein it charged and alleged that said law firm was guilty of gross negligence in the performance of said services, occasioning it great damage, was properly united as a ground of defense with said denial.

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UNDER THE PROVISIONS OF THE OREGON CODE, the court may direct a reference without the consent of the parties, or of its own motion, where the trial of an issue of fact requires the examination of a long account on either side. Where, therefore, the plaintiff's claim consisted of about 180 items in number, which varied in amount from fifty cents to \$550, as shown by a bill of particulars furnished by the plaintiff: *held*, that the case was a proper one for the court to direct a reference. The decision in *Tribou v. Strawbridge*, 7 Or. 156, approved.

APPEAL from a judgment of the Circuit Court for the county of Multnomah, entered upon the confirmation of the report of a referee.

The appellant commenced an action against the respondent in the said circuit court, to recover a claim for work, labor, and services alleged to have been performed by the law firm of McDougall & Bower, as attorneys, between the second day of February, 1882, and the first day of September, 1887, for the respondent, upon its retainer, and for money paid and agreed to be paid by said firm in the prosecution of the respondent's business, at its request, which claim the appellant alleged had been assigned to him by said McDougall & Bower; also to recover a claim for the breach of an agreement, alleged to have been entered into between the respondent and said law firm on the twenty-fifth day of February, 1882, whereby said firm agreed and undertook to perform work and services as attorneys at law in loaning money for respondent on real-estate security in the state of Oregon and territories of Washington and Idaho, for which the respondent, besides the payment of certain fees, agreed to retain said firm in prosecuting all suits and actions for the foreclosure and collection of any mortgages and loans that might be accepted by the respondent, and upon the abstract of which the said firm had passed and certified, and to pay said firm for such services a reasonable compensation in all such matters, suits, and actions brought

Statement of Facts.

to foreclose and collect any such loan or mortgage, which latter claim the appellant also alleged had been assigned to him by said McDougall & Bower. The appellant alleged in his complaint in said action that there was due him upon the first of said claims the sum of \$10,717.14, and upon the second one the sum of \$12,000. The respondent, in its answer to the said complaint, denied that it ever retained said law firm, or that said firm ever performed services or paid out money for it, or that it ever had a contract with said firm, or that it ever promised to pay said firm for any services or money paid out. And, for a further answer, alleged hypothetically that the services rendered and money expended by said law firm, sought to be recovered in the action, were so rendered and expended for and at the instance and request of the Oregon and Washington Mortgage Savings Bank of Oregon, a corporation, and under and by virtue of a contract entered into by and between respondent and said bank, which took effect November 1, 1882, whereby said bank, in consideration of a portion of the interest to be earned upon loans of respondent's money, made by said bank, which was agreed to be paid and was paid by said bank therefor, agreed and bound itself to conduct the respondent's business and act as its agent in all its business in the state of Oregon and territories of Washington and Idaho, and at its own charge and expense to pay the remuneration of all attorneys and all cost of court, and all cost and expenses of foreclosing the respondent's mortgages and collecting its debts due upon said loans, and all expenses of every nature and description in and about the business of the respondent in said state and territories, and to hold the respondent harmless against the same, which said terms of said contract were well known to said McDougall & Bower at the time thereof; that all the mortgages foreclosed by said law firm, for

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which appellant sought to recover foreclosure fees in the action, provided by their terms for the payment by the mortgagors of the sum of twenty per cent upon the amounts due therein at the time of foreclosure, as attorney's fees in such foreclosure suits, and all of the foreclosure suits brought by said law firm were brought under said agreement between the respondent and said bank under an express agreement made between said bank and said law firm, whereby the latter agreed to conduct said suits in consideration of the attorney's fees so stipulated to be paid by the mortgagors when the same should be realized upon foreclosure; and that until such attorney's fees could be collected and received by the bank for the respondent, over and above the mortgage debts, interests, and costs upon such loans, no foreclosure fees whatever should be due or payable to said firm; that on the foreclosure of said mortgages the lands mortgaged were bid in by the said firm in the name of respondent without its knowledge or consent, and for the amount of the respective loans, interests, costs, and attorney's fees stipulated therein to be paid, and the accruing costs; and that respondent holds said lands and is unable to sell the same; and that the value of said lands, at the time of such foreclosure sales, and at all times since, has been less than the amounts of said respective bids by at least fifteen thousand dollars; and that respondent cannot realize out of said lands the amounts due it upon the loans so made, with the interest upon the same. And, as another and further answer, the respondent alleged that the fees sued for arose from proceedings on certain mortgages which the bank as its agent had taken under an agreement to take none but choice securities, and to vest a good title in respondent; that said McDougall & Bower were attorneys for the bank, and knew the terms of the agreement, and they furnished to said bank, to be furnished to

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respondent, certificates certifying that they had made careful examinations, and that the respective mortgagors were seised in fee-simple of the lands mortgaged, and that they were free from encumbrance; and respondent, relying upon such certificates, made the loans; that said certificates were made without examination of the records, and in some instances the mortgagors had no title, and in some there were prior liens; that the said attorneys were grossly negligent in many instances, which were enumerated in the answer, which occasioned damages to respondent amounting in the aggregate to more than the claim of the appellant for damages. The appellant filed motions to strike out these further answers, on the ground that they were sham, frivolous, and irrelevant, which motions the court denied. The appellant then filed a reply controverting the new matter set up in the answer. The other facts in the case sufficiently appear in the opinion of the court.

McDougall & Bower, for Appellant.

Gearin & Gilbert, for Respondent.

THAYER, C. J.—The main issue in this case in the circuit court was whether the performance of the services and expenditure of the money by the law firm of McDougall & Bower, as alleged in the complaint, were done and made in pursuance of a direct employment of said firm by the respondent, or were done and made under an arrangement entered into between said firm and the corporation known as the Oregon and Washington Mortgage Savings Bank of Oregon as a part compliance with a contract between the latter and the respondent.

If the respondent contracted with the Mortgage Savings Bank, as alleged in its answer, and the bank, in order to

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carry out that contract, employed said law firm, and the services were rendered and money expended by the firm in pursuance of such employment, with an understanding of the relations existing between the bank and the respondent, then the firm had no recourse upon the respondent, but was necessarily obliged to rely upon the bank for compensation and remuneration.

That issue was tried by the referee, who appears to have found that said law firm performed the services and expended the money at the instance and request of the bank, pursuant to a contract entered into between the bank and the respondent, as alleged in the answer; that said firm had knowledge of the terms of said contract when the services were rendered and money expended, and the same were not done at the instance or request of the respondent.

Said finding stands as the verdict of a jury, and is conclusive against any right of recovery upon the part of the appellant. Unless, therefore, some error were committed at the trial, or in the proceedings had in the action, prejudicial to the rights of the appellant, this court has no alternative but to affirm the judgment appealed from.

The appellant in his notice of appeal assigned several grounds of error on which he intended to rely upon the appeal, and which his counsel insists are tenable. The first ground of error assigned is the denial of the appellant's motion to strike out parts of the respondent's answer, and his further answers to the complaint. The parts of the answer sought to be stricken out relate to the allegations that the services rendered and money expended by the said law firm were not rendered and expended for the respondent, but for and on behalf of and at the instance and request of the said bank under and by virtue of the contract between the bank and the respondent before referred to; also to divers other parts of

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the answer, including the respondent's claim to damages on account of the alleged careless and negligent manner in which said law firm conducted the business of loaning respondent's money; and substantially all that part of the answer not included in the denial, that the services were rendered and money expended for the respondent. The appellant's counsel contend that it was incumbent upon the appellant to show that the respondent employed the said law firm before he could claim a recovery in the action, whether said matters were pleaded or not, and that therefore it was unnecessary to allege them. If that were so, I do not think it follows that the facts set up in the further answers were sham, frivolous, or irrelevant within the meaning of the provisions of the code which permit such answers and defenses to be stricken out on motion. It may be true that said facts would not have been admissible in proof upon a mere traverse, but that should not deprive the respondent of the right to make its answer specific. The services rendered and money expended were ostensibly for the benefit of the respondent, and it was clearly proper, it seems to me, for it to allege all the facts under which they were done, in order to rebut any presumption that might arise from that circumstance. The pleading was in the nature of a confession and avoidance.

The respondent admitted, in effect, that the law firm did perform services and expend money in and about its business; and to avoid the presumption of a claim that might arise from that circumstance, alleged that it had contracted with the bank to do the business at a fixed compensation, the latter to employ the necessary attorneys therefor, and that said firm was employed by the bank to assist in carrying out such contract.

Nor was the defense that the law firm was guilty of negligence in the management of the said business irrele-

vant. It was unnecessary, if the other defense proved good; but the respondent's counsel could not be certain of that, and hence they prudently interposed the further defense to fall back upon, in the event of the failure of the former. A party has the right to set forth by answer as many defenses and counterclaims as he may have, and it does not follow, because he has set up one defense which is good upon its face, that, therefore, he shall not be permitted to set up another.

If a party were sued upon a promissory note which he had never made, but notwithstanding had paid, he certainly would not be precluded from denying the making of the note, and, at the same time, pleading its payment. The rule, as I understand it, in regard to inconsistent defenses is, that defenses are not inconsistent when they may all be true; that they are only inconsistent when some of them must necessarily be false, if others of them are true; in such case they cannot be united. The two defenses set up in the answer, that the respondent never employed the law firm of McDougall & Bower, and that they were guilty of gross negligence in the management of the business, were not necessarily inconsistent, as they both may have been true. If the respondent had denied the *rendition* of the services, and then alleged that they were negligently and unskillfully performed, the case would have been different. In the latter case, the two defenses, unless the denials were with an *absque hoc*, as it was termed, would be inconsistent, as both could not be true. I think the motion to strike out was properly overruled. If, however, the ruling had been erroneous in that particular, it would have been no ground for reversing the judgment, and it could not possibly have prejudiced the appellant.

Another of the grounds of error assigned is, that the court erred in referring the action. The record discloses

that the respondent's counsel filed a motion to refer the case to a referee; that the motion was made mainly upon the pleadings in the cause; that it was argued by counsel *pro* and *con*; that the court found that the trial of the issues in the case would require the examination of a long account; that it was a case proper to be referred; and thereupon the order of reference was made. An examination of the proceedings in the action shows that the appellant, in compliance with a demand in writing made by the attorneys for the respondent, furnished a bill of the items of account of the labor and services and of the money paid out and expended by the said law firm, which are alleged in the complaint, and that said items consisted of about 180 in number, which varied in amount from fifty cents to \$550. From this fact, the circuit court seems to have made the holding referred to, of which the appellant's counsel complains.

The code, section 222, provides that the court may direct a reference when the trial of an issue of fact shall require the examination of a long account on either side, without the consent of the parties, or of its own motion. It has been claimed, however, that said provision of the code was unconstitutional; but this court, in *Tribou v. Stroubridge*, 7 Or. 156, held otherwise, and I think we are bound by that holding. According to the decision in that case, the order of reference herein was properly made, and should be sustained.

I have examined the other grounds of error assigned, and do not think they are well taken. There were some irregularities in returning certain commissions issued to take the depositions of witnesses on the part of the respondent, but they were not of a character which would justify the court in suppressing the depositions taken under the commissions.

The judgment appealed from will therefore be affirmed.

[Filed June 20, 1889.]

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31 473STATE OF OREGON, RESPONDENT, v. CHEE GONG,
APPELLANT.

MATTER WHICH CONSTITUTES NO PART OF THE RECORD PROPER cannot be considered on appeal, unless incorporated in a bill of exceptions.

UNTIL SUCH MATTER IS PUT INTO A BILL OF EXCEPTIONS, and is authenticated as required by law, the court cannot receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings.

WHETHER A WITNESS MAY BE ASKED CONCERNING ANY SERIOUS CHARGE brought against him rests in the sound discretion of the court to allow or exclude such inquiry as the ends of justice may seem to require.

THE DISTINCTION BETWEEN A MAP OR PLAN not admitted in evidence, but used only to enable the witness to explain the different points, location, etc., as to which he testifies, and such a map admitted as evidence of the *locus in quo* noted.

THE ALLOWANCE OF LEADING QUESTIONS rests in the sound discretion of the trial court.

WHEN THE CHARGE IS THE KILLING WITH A KNIFE, and all the evidence, taken together, tends to identify the knife used in evidence as the one used by the prisoner, the question of the identity of the knife is exclusively for the jury.

Williams & Wood, for Appellant.

Henry E. McGinn, for Respondent.

LORD, J.—The defendant was indicted, tried, and convicted of murder, and sentenced to be hanged. To procure a reversal of that sentence and a new trial, several errors have been assigned and argued, with candor and much ability. Of these assignments of error the two most important, and upon which the most stress is laid, do not constitute a part or *any* part of the bill of exceptions, nor are they any part of the record proper. They consist simply of affidavits used presumably upon the motion for a new trial.

It has been often held, and expressly so by this court in *State v. Drake*, 11 Or. 396, that matter which consti-

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tutes no part of the record proper cannot be considered on appeal unless incorporated in a bill of exceptions. The reason is, until such matter is put into a bill of exceptions, and the bill authenticated as required by law, the court cannot receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings. It may not be amiss, however, to say that the first objection—the right of the accused to be present at the jury view ordered by the court—has twice been expressly decided adversely to the contention of the defendant by this court (*State v. Ah Lee*, 8 Or. 214, and *State v. Moran*, 15 Or. 276), and that it would hardly be a safe practice to overturn two solemn adjudications upon matters not properly before us, and about which there is an admitted diversity of judicial opinion. Besides, it is admitted that at the time the court made the order, the defendant and his counsel were informed of their right to be present, and that they stated in open court, for the defendant and themselves, that neither their client nor themselves wished to be present at the jury view of the place where the murder was committed, and added that they made this statement without any mental reservation whatever. Upon the assumption that it is the right of the accused to be present, how was an exception to be taken when the court distinctly informed the defendant and his counsel of that right, and he and they as distinctly refused to exercise it? Was it error because the court did not order its executive officer to bind the defendant hand and foot, and carry him forcibly to the place where the murder was committed and the jury view ordered?

But it is hardly necessary to pursue the subject further, as our only object in adverting to the matter is to show the extremely fragile ground upon which this objection is urged upon all the admitted facts and circumstances.

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It is enough that the matter is not before us, to exclude its consideration, and this observation equally applies to the other proposition discussed.

It is also claimed that the court erred in not allowing the witness Ah How to answer, on cross-examination, the question: "Did you not kill a man in Chicago, and flee from there?" In *State v. Bacon*, 13 Or. 155, the principle involved in such an inquiry on cross-examination received a careful consideration in this court, and the result reached is adverse to the contention of counsel. As the court has no disposition to change or modify the view therein expressed, that case must control, and is decisive of the principle here involved.

The next error assigned is the admission in evidence of a certain map of the China theater, and in permitting the witnesses called by the state to refer to the map when testifying. The distinction between a map not admitted as evidence, but only to enable a witness to explain the position of different points, locations, etc., as to which he testifies, and a map admitted as evidence of the *locus in quo*, is noted and conceded. But according to our judgment upon the evidence as exhibited by the bill of exceptions, the map was authenticated. It was shown by those who were familiar with the interior of the theater, and recognized by them as correct in design. Indeed, there does not seem to have been any doubt as to this, only that it was not drawn upon a scale. This was not error.

The two next errors assigned involve the same question, viz., the identity of the knife. The argument, in effect, is, that the evidence was too remote to connect the defendant with the knife. It may be that the testimony is susceptible of some criticism as to the order of its introduction,—a matter which is liable to occur where there are numerous witnesses,—but, when taken together and in connection with the facts, the identity of the knife is

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sufficiently established. It is alleged in the indictment that the killing of Lee Yick was caused by stabbing him in the head with a knife. As the state was bound to prove this, a Dr. Panton, who had examined and described the wound, also stated the kind of instrument by which it was likely to have been produced, and further testified that he had seen "a knife which was said to have been used." He was then asked whether he would recognize the knife now shown him as the one which he saw, which, being objected to, the court permitted him to answer to the extent of indentifying the knife. He answered that "it was either this one or one exactly similar. This appears to be the knife, as far as I remember." Now, this alone was manifestly insufficient, but there is other evidence which must be considered to determine the point we are required to decide.

To summarize, the evidence in the bill of exceptions discloses that when the onslaught was made on Lee Yick in the theater, among his assailants was the defendant, who alone was armed with a knife, the others being armed with iron bars and a hatchet; that, at the place where the killing occurred, a knife was found with the point covered with blood about two inches up the blade, which was taken by one of the police to the station, and that the knife was the property of the defendant. At the former trial of the defendant, that knife was identified by the officer Hoxie, who identified it at the present trial of the defendant. He says: "I identified the knife at that time, and I believe this is the same knife. I think it is the same knife." Nor is this all. The evidence of Lee Toy shows that the defendant had worked for him, that he had seen the knife in the room of the defendant before the killing had occurred, and that it was the property of the defendant; that the next time he had seen the knife was in the court-room on the former trial. Now, when, in

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the present trial, the knife was handed to him, and he was asked to look at it, and state if he could identify it as the knife he saw in the possession of the defendant, his answer was: "That is the same knife." Whereas, in this case, the charge is the killing with a knife, and all the evidence taken together tends to identify the knife in evidence as the one used by the prisoner; the question of the identity of such knife is exclusively for the jury.

The next objection is, that the court permitted a question to be asked which suggested the answer, viz., "State whether or not Chee Gong was armed that night." It is asserted by some authorities that the allowing of leading questions is a matter wholly within the discretion of the court, while others hold if such discretion has been abused it is a ground of error. Mr. Greenleaf says: "When and under what circumstances a leading question may be put is a matter resting in the sound discretion of the court, and not a matter which can be assigned as error." (1 Greenl. Ev., sec. 435.) Assuming that the question is leading, when it is remembered how difficult it is to take Chinese testimony, and that the matter, at any rate, rests in the sound discretion of the court, we are unable to say that there was any error. The answer was, "I saw him have a knife," and this is the concurrent testimony of all the witnesses. The result is, that we are unable to find any error upon the record before us, and in such case our duty is to affirm the judgment, and it is so ordered.

Points decided.

[Filed June 20, 1889.]

W. H. BIGGS, APPELLANT, v. GEORGE W. McBRIDE,
SECRETARY OF STATE, RESPONDENT.

STATUTE — WHEN SAME TAKES EFFECT — EMERGENCY. — An act which passes both houses of the legislature, and which contains an emergency clause, followed by the words, that the same "shall take effect and be in force from and *after its approval by the governor*," but which the governor never approves, but vetoes, and the same is then duly passed by both houses by the necessary majorities, notwithstanding the veto, takes effect and is in force from and after its passage.

STATUTE — EMERGENCY CLAUSE — VETO — WHEN TAKES EFFECT. — Such act takes effect when the law-making power has done every act or thing necessary under the constitution to its complete enactment as a law.

CONSTITUTIONAL LAW — EMERGENCY — POWER OF THE LEGISLATURE. — The constitution has vested in the legislature the power to declare in the body or preamble of an act the emergencies by which it may be put in force in less than ninety days after the adjournment of the session; and when the emergency is specified in the act, the same is conclusive upon the courts, and is not reviewable.

EXECUTIVE OFFICE — POWER TO FILL VACANCIES. — By article 5, section 1, of the constitution, the chief executive power of the state is vested in a governor, but this does not include the power to fill vacancies in office. When and under what circumstances that power may be exercised by the governor is prescribed and defined by section 16 of the same article.

CONSTITUTIONAL LAW — CONTEMPORANEOUS CONSTRUCTION. — When a power has been exercised by one department of the government ever since the adoption of the constitution, and such exercise has been constantly acquiesced in by the other departments as well as the people, such practical construction is of great weight in doubtful cases, and should not be lightly regarded in any case.

OFFICE — REMOVAL FOR CAUSE — IS THE POWER JUDICIAL OR EXECUTIVE? — THE QUESTION STATED, BUT NOT DECIDED — OPPORTUNITY TO BE HEARD. — Whether the power to remove an officer *for cause* may be conferred upon the governor, or belongs exclusively to the judicial department of the government under the constitution, is not decided; but by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense.

TRIAL — TITLE TO OFFICE — MANDAMUS. — *Mandamus* is not the proper proceeding by which to try the title to an office.

APPEAL from Marion County.

17 640
22 150
22 152
21* 878
29* 358
29* 350

17 640
28 587

17 640
134 37
34 28

17 640
44 149
44 150

Opinion of the Court—Strahan, J.

Joseph Simon, Richard Williams, and George H. Burnette, for Respondent.

N. B. Knight, P. H. D'Arcy, and J. J. Murphy, for Appellant.

STRAHAN, J.—This proceeding was instituted by the plaintiff, claiming to be one of the railroad commissioners of the state, against the secretary of state, to compel him by writ of *mandamus* to draw a warrant upon the state treasury for the sum of \$277.77, being the amount claimed as plaintiff's salary up to the date of the filing of the petition for the writ.

The petition alleges, in substance, that George W. McBride is the duly elected, qualified, and acting secretary of state of the state of Oregon, and is, by virtue of said office, the auditor of public accounts; that your petitioner is one of the duly appointed, qualified, and acting railroad commissioners of the state of Oregon, constituting one of the members of the board of said railroad commissioners of said state, and has been such since the twenty-first day of February, 1889, at which time the appellant was duly appointed said railroad commissioner by Hon. S. Pennover, governor of the state of Oregon, in pursuance of a law duly enacted and passed at the fourteenth regular session of the legislative assembly of said state, and which was approved the 18th of February, 1887; that as such railroad commissioner your petitioner, on the thirty-first day of March, 1889, became entitled to receive for his services as such officer the sum of \$277.77, in United States gold coin, for the quarter ending March 31, 1889; that on the first day of April, 1889, your petitioner applied to said defendant, at his office in the city of Salem, and requested and demanded that the defendant, as such secretary of state and auditor of public accounts, should audit, allow, and issue his warrant upon

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the treasurer of the state for the payment of said \$277.77, but that the defendant refused and neglected, and still does refuse and neglect, without lawful right or excuse, to either audit, allow, or issue his warrant upon said treasurer for the payment of said claim, or any part thereof; that your petitioner has no plain, speedy, or adequate remedy at law for the recovery of said sum of \$277.77, which became justly due and owing to the plaintiff on the thirty-first day of March, 1889. Prayer that the writ of *mandamus* be awarded, etc. The defendant demurred to the writ, upon the ground that the same did not state facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief, which demurrer was sustained, and the writ dismissed, from which judgment this appeal was taken.

The appellant's notice of appeal specifies, in substance, the following grounds of error, upon which he intends to rely upon the appeal: 1. The court erred in sustaining the defendant's demurrer; 2. The court erred in denying the writ of *mandamus* prayed for in said cause; 3. The court erred in dismissing plaintiff's cause at his costs.

The board of railroad commissioners in this state was created by the act of the legislative assembly approved February 18, 1887. This act, among other things, provided that such board should consist of two persons, to be appointed by the governor from each of the two political parties, who should hold their offices for and during the term of four years, or until their successors are appointed as in said act provided; and if a vacancy occurs by resignation, death, or otherwise, the governor, in the manner thereafter provided, was to appoint a commissioner to fill such vacancy for the residue of the term, and might in the same manner remove any commissioner *for cause*.

During the session of the legislative assembly next preceding the expiration of the term of office of the commis-

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sioners first appointed by this act, and every four years thereafter, it was made the duty of the governor, by and with the advice and consent of the senate, to appoint the successors of such commissioners, who should in like manner serve for four years. It was further provided that said commissioners should be selected, one from the political party that cast the highest number of votes at the last general election in this state preceding his appointment, and one from the political party casting the next highest number of votes at said election. Pursuant to this act, a board of commissioners was appointed by the governor, who continued to serve until the sixteenth day of January, 1889, on which day the governor made an executive order removing them *for cause*.

On the twelfth day of February, 1889, the legislative assembly passed an act amendatory of the existing law on the subject of railroad commissioners, whereby the board was increased to three persons, and provision was made for choosing said commissioners biennially by the legislative assembly, and they were to hold office for the term of two years, and until their successors were elected and qualified.

The following emergency clause was added at the end of the bill:—

“Section 5. Inasmuch as the amendments herein proposed would greatly tend to benefit the people of this state, and there is urgent necessity therefor, this act shall take effect and be in force from and after its approval by the governor.”

The act was vetoed by the governor on the nineteenth day of February, 1889; on the same day it passed the senate, notwithstanding the veto of the governor, by the requisite majority, and on the twentieth day of the same month it passed the house by a like majority, and was deposited in the office of the secretary of state.

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On this statement, three questions have been argued before us and presented for our determination: 1. The event on which the last-named act was to take effect never happened. This left the first act in force under which the governor might lawfully appoint. 2. The amendatory act contains no emergency clause. It did not, therefore, go into effect until ninety days after the adjournment of the legislature. This view would also leave the first act in force during the ninety days, and the governor might exercise the power of appointment during that time. 3. But conceding that either of the objections are well taken, and that the amendatory act took effect on the twentieth day of February, 1889, still the legislative assembly could not exercise the power of appointment. That is an executive act, and belongs exclusively to the governor, under the constitution. These questions will be examined in their order.

1. The point of contention presented by the first question arises out of the language used in section 5 of the amendatory act, to the effect that the same should take effect and be in force from and after *its approval by the governor*. It is contended by the appellant that by the terms of the act itself it was only to be in force from and after its approval as aforesaid, and if the governor failed to approve it, it could only take effect at the end of ninety days after the adjournment of the session. But it seems to me this argument proves too much. If the words "from and after its approval by the governor" are to be treated as a condition precedent, as the contention assumes, then it could never take effect, for the reason the condition had never happened. But this method of treating a grave constitutional question seems scarcely satisfactory. It seems more like a quibble over words than an attempt to ascertain what the legislature really meant by the use of the phraseology in question. I think

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there can be no doubt that the legislature used the language in question in the same sense they used the words "from and after its passage." Wherever an emergency clause was added to a bill, one of these forms of expression seems to have been used, and manifestly they are used to convey the same meaning. Turning to the Session Acts of 1889, on page 1, the form of expression used is, "shall take effect immediately upon its approval by the governor"; on page 4, the form used is, "shall take effect and be in force from and after its approval by the governor"; on the same page is another act, and the form of expression is, "shall take effect and be in force from and after its passage"; on page 6, the form is, "shall be in force from and after its approval by the governor"; on page 7, the same form of expression is used. On page 9 is the act regulating the sale of spirituous liquors in this state, and the same form is observed. [The governor did not approve this act, nor did he, within five days after it was presented to him (Sundays excepted), return it to the house in which it originated, with his objections, but filed it with the secretary of state. But it is useless to follow these forms of expression throughout the volume containing the laws enacted by the legislature of 1889.] Every act containing an emergency clause concludes with one or the other of these forms of expression, with an occasional slight variation that does not affect the sense. A careful review of all of these acts, including the one under consideration, leads us to the conclusion that those are equivalent expression, and that they mean that the several acts in which they are used shall take effect and be in force from and after their passage; that is, from and after the time when the law-making power shall have done every act necessary under the constitution to their complete enactment as laws. This is the clear legislative intent, and by that

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we must be guided in construing every statute, unless some principle of the constitution is invaded. The following cases sufficiently indicate the power of the legislature, and in what manner it is exercised in putting enactments into force: *Matter of Welman*, 20 Vt. 653; *Hamlet v. Taylor*, 5 Jones, 36; *Tarlton v. Pegg*, 18 Ind. 24; *Goodsell v. Boynton*, 1 Scam. 555; *State v. Click*, 2 Ala. 26; *Matter of Joseph Richardson*, 2 Story, 571; *People v. Clark*, 1 Cal. 406; *Baker v. Compton*, 52 Tex. 252; *Logan v. State*, 3 Heisk. 442; *The Brig Ann*, 1 Gall. 61; *Rathbone v. Bradford*, 1 Ala. 312; *Smets v. Weathersby*, R. M. Charlt. 537.

+ 2. Article 4, section 28, of the constitution, provides:
+ “No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.” It is contended by the appellant that there is no emergency declared in the body of this law, and that, therefore, the act did not take effect until ninety days after the adjournment of the legislature. In the absence of a constitutional or statutory rule upon the subject, all statutes would take effect from the first day of the session at which they are passed, at least that is the common-law rule. (Cooley’s Constitutional Limitations, sec. 156.) But the constitution of this state has prescribed the rule by which every department of the government is bound, and the only duty the court has to perform is, to determine whether or not it has been complied with in this particular case. The emergency is declared in these words: “Inasmuch as the amendments herein proposed would greatly tend to benefit the people of this state, and there is urgent necessity therefor,” etc., I do not think that the latter member of the sentence adds anything to the first.

It declares no emergency. It is the fact of the existence of any event or occasional combination of circumstances

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which calls for immediate action or remedy, or the fact that some pressing necessity or exigency exists which enables the legislature, by declaring the same in the preamble or body of the act, to put the same in force sooner than the time prescribed in the constitution in cases where there is no such emergency, or the same is not so declared.

But in all such cases it is for the legislature to ascertain and declare the fact of the existence of the emergency, and its determination is not reviewable elsewhere. The constitution has vested the law-making department of the government with the power to determine that question (*Carpenter v. Montgomery*, 7 Black, 415; *Gentile v. State*, 29 Ind. 409), and such determination is not made reviewable in the courts. No doubt the emergency must be declared in the body or preamble of the act, but if there is no fact, event, or state or condition of affairs mentioned which the legislature determines creates an emergency, no difference how strongly or directly it may be asserted in the act that it is necessary that it should go into effect immediately, the legislative declaration must fail, for the reason that the constitution is not complied with. / By the act under consideration it is declared that the amendments proposed therein "would greatly tend to benefit the people of this state." "Benefit to the people" is the object and purpose of all government; and where the result is manifest, no doubt the legislature ought to resort to unusual and even extraordinary ends to attain it. It is true, in this case, we may be unable to perceive in what manner the proposed benefit is to accrue; but the legislature having declared that the people will be benefited, we must assume that such determination is proper, and, so far as the court is concerned, final. Such determination is in its nature political, and not judicial, and for such errors, if they be errors, the remedy must be found in the virtue

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and intelligence of the people. The ballot-box is the medium through which they may be corrected.

3. The third question remains to be considered. It has been argued, in effect, on the part of the appellant, that, under the constitution of this state, the legislature cannot create a new office—one not provided for by the constitution—and fill it by an election in joint convention of the two houses; that while it is competent for the legislature to create such additional offices as the public necessities may require, still, when created, if an election by the people is not provided for, the right to fill the same by appointment is devolved upon the governor by the constitution. In other words, the right to fill a vacant office belongs to the executive as one of the duties pertaining to his office, and that the assumption on the part of the legislature to fill the office of railroad commissioners by persons of their own selection is a usurpation, by that department of government, of powers that are vested by the constitution in the executive. By article 3, section 1, of the constitution, it is provided: "The powers of government shall be divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial,—and no person charged with official duties under one of these departments shall exercise any of the functions of another except as in this constitution expressly provided." For most practical purposes, the line of demarkation which separates the three departments of government the one from the other are obvious enough, and there is but little probability that one department will assume to exercise functions which properly belong to one of the others. It is only where the power in question lies near the border-line that any serious question can arise, and then it must be determined on its own particular facts.

In *Wynham v. People*, 13 N. Y. 391, the court of appeals

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pointed out the difficulty of attempting any general definition of this distribution of powers. Speaking through Comstock, J., the court said: "I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. They are by the constitution distributed to other departments of the government. It is only the legislative power which is vested in the senate and assembly. But when the constitution is silent, and there is no clear usurpation of the powers distributed to the other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said: 'How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.' That very eminent judge felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to have been founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law certainly are among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government." It was not claimed at the argument that there is any express provision of the constitution which authorized the governor in direct terms to make the appointment in question, but that it is included in the grant contained in section 1, article 5, of the constitution. That section declares: "The chief executive power of

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the state shall be vested in a governor." Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of "the chief executive power of the state," the appellant's contention would be sustained. But no authority whatever has been cited to sustain this view, nor is it believed that any exists. On the contrary, the provisions of the fifth article of the constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogatives in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the state so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or in some cases of changing the method of filling an existing office. In 1870, the legislature, by an act, created a vacancy in the office of clerk of this court, and provided for filling the same by an election in joint convention of the two houses. (Acts 1870, p. 58.) A clerk was elected under this act by the legislature and served by virtue of such election until the law was repealed and the power to appoint vested in the court. The librarian has always been selected by the legislature since the office was created, and so has the pilot and fish commissioners, and when the office of state geologist was created, the legislature named the officer in the body of the act. (Acts 1872, p. 105.) The power exercised by the legislature in the appointment of some of these officers is almost coeval with the constitution. The power thus exercised has never been called in question, but has ever been acquiesced in by every department of the government, and is in itself a contemporaneous construction

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of the constitution, which, if the question were doubtful, might be sufficient to turn the scale in its favor. Under any view, such construction is entitled to great weight, and could not be lightly regarded.

4. Thus far, nothing has been said on the subject of the power of the governor to remove the railroad commissioners. The act under which they were appointed provided that he might remove them *for cause*. This clearly implied that they could not be removed at the mere will of the governor, or without cause. Whether such a power is so far judicial in its nature that it cannot constitutionally be vested in the chief executive, as many authorities hold (*Page v. Hardin*, 8 B. Mon. 648; *Curry v. Stewart*, 8 Bush, 580; *Hyde v. State*, 52 Miss. 665; *State v. Pritchard*, 36 N. J. L. 101; *Honey v. Graham*, 39 Tex. 1; *Dallam v. Wilson*, 53 Mich. 392), or whether it is in its nature executive, and therefore properly belongs to the governor, we do not at this time undertake to determine. But it is believed, under either view, and by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense. (*Dallam v. Wilson*, *supra*; *Attorney-General v. Hawkins*, 44 Ohio St. 98; *People v. Fire Commissioners*, 72 N. Y. 445; *People v. Mayor of the City of New York*, 19 Hun, 441.) But we do not decide this question now, and we only refer to it to avoid misconception.

5. There is another question I think proper to mention for the same reason. The ostensible object of this proceeding is to obtain payment from the state treasury of the salary plaintiff claims as railroad commissioner, but we cannot shut our eyes to the fact that its real object is to try the plaintiff's title to that office, and that is the question discussed; but no objection was made by the respondent; and on account of the public importance of

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the questions involved, we deem it best to indicate an opinion on them. The better view is, that this is not the proper proceeding to try the title to an office. (High on Extraordinary Legal Remedies, sec. 42; *Moses on Mandamus*, 150; *People v. Olds*, 3 Cal. 167; *Meredith v. Supervisors of Sacramento*, 50 Cal. 433; *Warner v. Meyers*, 4 Or. 72; *People v. New York*, 3 Johns. Cas. 79; *People v. Stevens*, 5 Hill, 616; *Matter of Gardner*, 68 N. Y. 467; *State v. Auditor*, 34 Mo. 375; *State v. Auditor*, 36 Mo. 70; *People v. Detroit*, 18 Mich. 338.) Something was said at the argument in relation to a stipulation that this question should not be insisted upon by the respondent. The stipulation does not appear of record, and if it did, it would not affect the result. Such a stipulation would be contrary to law, and could not be enforced. The law has fixed the extent and uses to which the writ of *mandamus* may be applied, and the stipulation or agreement of the parties can neither enlarge nor lessen the same.

The judgment of the court below must therefore be affirmed.

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APPEALS.

1. UNDER THE LAWS OF THIS STATE, AN APPEAL FROM A JUDGMENT OF CONVICTION for the violation of a city ordinance, rendered by a tribunal of the city, does not lie unless expressly given by the city charter, or by some statute. Where a right of appeal in such a case is not given, as mentioned, a writ of review will lie to examine the proceedings had on the conviction, in order to ascertain whether or not the tribunal before whom they were had exercised its functions erroneously, or exceeded its jurisdiction to the injury of the plaintiff in the writ. A writ of review in such a case, like a common-law *certiorari*, only brings up the record, which includes the complaint and proceedings had thereon; and no question of fact determined by the tribunal, or any ruling made by it in the admission of evidence upon an issue of fact, can be considered. — *Barton v. La Grande*, 577.
2. UNDERTAKING — WAIVER OF EXCEPTIONS TO SUFFICIENCY OF SURETIES. — The time when an appeal shall be deemed perfected is not changed or affected in any way by the respondent's filing in the cause a written waiver of all exceptions to the sufficiency of the sureties in the undertaking. — *Callahan v. Portland & W. V. R. R. Co.*, 556.
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7. **TRANSCRIPT. — EFFECT OF NOT FILING IN THE TIME ALLOWED BY LAW.** — Where P. perfected an appeal to the supreme court from a circuit court, but failed to file his transcript as provided by the code: *held*, that the court had no jurisdiction to grant an order allowing the transcript to be filed *nunc pro tunc*, whatever the reasons may have been occasioning the neglect. — *Id.*
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15. **JURISDICTION TO HEAR.** — Specifying the grounds of error in such a case is not essential to give jurisdiction to hear the appeal, but is required in order to inform the adverse party as to the points he will be expected to controvert in the appellate court. — *Id.*
16. **PRACTICE — ASSIGNMENT OF ERROR.** — The appellant must point out in his notice of appeal the particular error upon which he intends to rely. He cannot be permitted to say that the court erred in its charge on a particular subject, where the subject as well as the charge consists of numerous and distinct parts. The appellant must put his finger on the error complained of. — *Swift v. Mulkey*, 532.
17. **NOTICE OF APPEAL — ASSIGNMENT OF ERROR.** — The assignment of error in the notice of appeal must consist of a specification of particulars, so that the adverse party as well as the court may know on what particular error the appellant intends to rely on the appeal. — *Id.*

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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. **ASSIGNMENT BY DEBTOR—EFFECT OF ON LEGAL TITLE OF ASSIGNEE SO PROPERTY.**—An assignment whereby a debtor conveys all his property for the benefit of his creditors amounts to a complete cession or surrender of his property to his creditors. It operates to vest in the assignee the legal title to the property, but the beneficial interest is in the *cestui que trust* for the creditors. He is seized for them, not for himself, and the moment he is seized the substantial interest passes out of him to them. — *Monticelli v. Hogg*, 270.
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3. **ASSIGNOR—EFFECT OF HIS CONTRACTS ON THE ASSIGNED PROPERTY.**—Until the debts are paid and the trust fully performed, the assignor has no interest, legal or equitable, upon which to base a contract in the assigned property, and consequently, any contract made in relation thereto is without validity, and cannot be enforced. — *Id.*
4. **WHERE ONE DEALS WITH THE AGENT OF ASSIGNEES FOR THE BENEFIT OF CREDITORS WITH FULL KNOWLEDGE OF THE TRUE RELATION WHICH SUCH AGENT OCCUPIES TO THE PROPERTY AND THE OUTSTANDING EQUITIES, HE DOES SO AT HIS PERIL.** — *Foster v. Virtue*, 607.
5. **AN ORDER OR DECISION MADE BY A CIRCUIT COURT IN PROCEEDINGS TO SECURE CREDITORS A JUST DIVISION OF THE ESTATES OF DEBTORS WHO CONVEY TO ASSIGNEES FOR THE BENEFIT OF CREDITORS, DENYING TO A CREDITOR THE RIGHT TO A PRO RATA DIVIDEND IN THE ASSETS OF THE ESTATE OF THE ASSIGNOR, IS SUCH A FINAL DECISION, WITHIN THE MEANING OF SECTION 6 OF ARTICLE 7 OF THE CONSTITUTION OF THE STATE, AS ENTITLES THE SUPREME COURT OF THE STATE TO REVISE IT ON APPEAL.** In order to revise such final decision, however, where it involves the decision of an issue of fact, a statement, in the form of a bill of exceptions, containing the evidence given or facts proved in the trial of such issue, must be prepared and signed by the judge of the circuit court, and made a part of the record of the case. The appeal in such case must be taken by serving and filing the notice of appeal within six months from the entry of such decision, and by perfecting it, as in other cases of appeal to the supreme court. — *Mitchell v. Powers*, 491.
6. **THE PRESENTMENT OF A CLAIM TO AN ASSIGNEE IN PROCEEDINGS OF THE CHARACTER ABOVE REFERRED TO REQUIRES MORE THAN THE MERE DEMAND OF A SUM OF MONEY; A STATEMENT UNDER OATH OF THE DEBT OR LIABILITY WHICH IS ALLEGED**

to exist against the insolvent debtor should be made out and delivered or transmitted to the assignee, and should specify sufficient facts to apprise the parties interested in the estate of the nature and consideration of the debt. — *Id.*

7. A STATEMENT OF THE MERE EVIDENCE of the debt, such as a promissory note, is not sufficient, as "a note at best is but presumptive evidence of a debt." — *Id.*

ASSAULT.

See CRIMINAL LAW, 3-8.

ATTACHMENT AND GARNISHMENT.

1. STATUTORY CONSTRUCTION — SECTION 154, HILL'S CODE. — The word "may" in this section held to be equivalent to the word "must," and therefore when a sufficient undertaking is tendered to the sheriff under this section by a claimant of the property attached, it is his duty to accept it, and to deliver the attached property to such claimant. — *Kohs v. Hinshaw*, 308.
2. UNDERTAKING — LIEN OF ATTACHMENT. — By the execution of the undertaking provided for by section 154, Hill's Code, the lien created by the attachment is not vacated or destroyed. — *Id.*
3. A PARTY, IN ORDER TO ESTABLISH TITLE TO A DEBT under proceedings in garnishment upon execution, must show that a levy was made by virtue of the execution upon the debt, and that the law relating to such proceedings had been strictly complied with. — *Batchellor v. Richardson*, 334.
4. WHERE A GARNISHEE FURNISHES A SHERIFF to whom a writ of execution has been issued a certificate as to any indebtedness owing by him to the defendant in the writ, the plaintiff therein, if not satisfied with the certificate, may apply to the court, or judge thereof, where the action is pending for an order requiring the garnishee to appear and be examined on oath concerning the same; and if the plaintiff fail to pursue that course, he will be deemed to have accepted the certificate as true, and will not be permitted to question the statement contained therein. And where a garnishee furnished such certificate, and before any subsequent proceedings were had in the matter, furnished a second one, to correct a supposed mistake in the first, which the sheriff received and made a part of his return of the proceedings had on the execution. Held, that the plaintiff had no right to attempt a sale of the debt, when it appeared from the second certificate that the debt had been assigned by the defendant in the writ to a third person. — *Id.*
5. WHERE W. M. D. EXECUTED TO M. D. CERTAIN PROMISSORY NOTES, and a mortgage upon real property to secure their payment, and B. subsequently commenced a suit to foreclose the said mortgage, alleging an assignment of the notes and mortgage by M. D. to him; and R. and S. claiming that by virtue of an execution upon a judgment against M. D. in favor of one M., and of proceedings of garnishment had thereon, they became owners of the debt evidenced by the notes, and having been made parties defendant to the foreclosure suit by order of the court, and filed

an answer therein, in which they alleged that the assignment of the notes by M. D. to B. was done with an intent to defraud the creditors of the former, but did not allege that the execution was levied upon the said debt, nor prove that such levy was made; and it further appearing that W. M. D., when the sheriff, with the writ of execution against M. D., applied to him for the purpose of levying upon said debt, furnished the sheriff with a certificate, from which it appeared that he was owing said M. D. the said debt, but afterwards, and before any subsequent proceedings were had in the matter, furnished the sheriff a second certificate, to correct a supposed mistake in the first one, and from which it appeared that prior to the application of the sheriff to him with the writ of execution, the said M. D. had assigned the debt to B., and the said sheriff received the second certificate and made it a part of his return of the proceedings had on the execution, yet notwithstanding he proceeded, at the instance of M., to sell the said debt upon the execution at sheriff's sale, and R. and S. purchased it at such sale: *held*, that they acquired no title thereby to the debt, and had no sufficient standing in court to impeach the *bona fides* of the assignment from M. D. to B. — *Id.*

See PARTNERSHIP, 3, 4.

BAIL.

1. CRIMINAL LAW — UNDERTAKING OF BAIL — DESCRIPTION OF OFFENSE CHARGED. — An undertaking of bail taken before a magistrate upon a criminal examination must state briefly the nature of the crime charged, or it will be invalid. — *Belt v. Spaulding*, 130.
2. UNDERTAKING — DESCRIPTION OF THE OFFENSE CHARGED. — An undertaking which describes the offense which the defendant must appear and answer as abortion fails to describe any offense defined or made punishable by the law of this state. — *Id.*
3. BRIEF STATEMENT OF CRIME CHARGED — WHAT SUFFICIENT. — If the crime charged be one that has a technical name, as arson, murder, burglary, rape, larceny, and the like, it will be sufficient to indicate the charge by such general name; if not, enough must be stated in the undertaking to describe briefly some crime made punishable by the laws of this state. — *Id.*
4. UNDERTAKING MUST BE FILED WITH CLERK OF THE COURT WHERE DEFENDANT REQUIRED TO APPEAR. — Section 1476, Hill's Code, makes it the duty of the magistrate taking bail to file the same with the proper clerk forthwith upon the close of the examination. — *Id.*
5. FAILURE TO FILE UNDERTAKING — EFFECT OF. — Until such undertaking be filed with the clerk of the proper court, no judgment of forfeiture can be given or rendered by such court. — *Id.*

BALLOTS.

See ELECTIONS.

BILLS OF EXCEPTION.

See APPEALS; DEPOSITIONS, 3; PLEADING AND PRACTICE.

BONDS.

See APPEALS, 2, 3; ATTACHMENT AND GARNISHMENT, 1, 2; RAIL.

BOUNDARIES.

WHERE A PERSON, UNDER A MISTAKE as to the boundaries, enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake. — *Canfield v. Clark*, 473.

See WATERS, 1.

CERTIORARI.

See APPEALS, 1;

COMMISSIONERS.

See RAILROADS.

COMPLAINT.

See PLEADING AND PRACTICE.

COMPROMISE.

See INFANCY.

CONDITIONS.

See FORFEITURE.

CONSTITUTIONAL LAW.

1. EXECUTIVE OFFICE — POWER TO FILL VACANCIES. — By article 5, section 1, of the constitution, the chief executive power of the state is vested in a governor, but this does not include the power to fill vacancies in office. When and under what circumstances that power may be exercised by the governor is prescribed and defined by section 16 of the same article. — *Biggs v. McBride*, 640.
2. CONSTITUTIONAL LAW — CONTEMPORANEOUS CONSTRUCTION. — When a power has been exercised by one department of the government ever since the adoption of the constitution, and such exercise has been constantly acquiesced in by the other departments as well as the people, such practical construction is of great weight in doubtful cases, and should not be lightly regarded in any case. — *Id.*

See COUNTIES, 4; STATUTES; TAXATION, 2.

CONTRACTS.

1. WRITTEN CONTRACT — EXTRINSIC EVIDENCE. — Extrinsic evidence is not admissible, either to contradict, add to, subtract from, or vary the terms

of a written contract. All antecedent or contemporaneous negotiations or agreements are merged in the writing. — *Stoddard v. Nelson*, 417.

2. JOINT CONTRACT AS TO THIRD PARTIES — HOW REGARDED IN A COURT OF EQUITY. — Where two parties jointly contract an indebtedness to a third party on account of a matter in which each of the two has an interest, and they treat it in their dealings with such third party and with each other as a joint affair, a court of equity, in a suit between the parties to adjust their respective rights and liabilities on account of the debts, will, if in accordance with justice, regard it as a joint obligation, and will not undertake to determine that the party for whose immediate benefit it was created was a principal debtor, and that the other, who only received a remote benefit from it, was a mere surety for him, although no privity in fact existed between them. — *Vincent v. Logsdon*, 284.
3. *Id.* — Where L. was proprietor of a certain saw-mill, which J. T. V. desired to have removed and located upon land owned by her, subject to a life estate in her father and mother, and L. accordingly removed and located the mill, and J. T. V., being interested generally in having the mill operated, she and L., in order to further the enterprise, requested B. and K., from time to time, to furnish on joint account material, machinery, and labor for the mill, without any understanding between each other as to their respective rights and liabilities, thereby creating a debt against themselves, which became a lien upon the mill: *held*, that the allegation in the complaint to the effect that J. T. V., at the special instance and request of L., became security, and not otherwise, for him, and personally responsible to B. and K. for the material, machinery, and labor furnished by them from the mill, was not sustained by the proof; and that the debt, as between J. T. V. and L., should be regarded as their joint obligation. And J. T. V. having soon after become owner of the mill, and B. and K. having commenced a suit against her and L. and others to foreclose such lien, and enforce payment of said debt; and L., at the instance and request of J. T. V., having deposited a note and mortgage held by him against a third person with B., with directions to the latter to raise money thereon and pay off the debt, which were subsequently, in accordance with an understanding between J. T. V. and L., surrendered up, and another note and mortgage substituted by L. in their stead; and B. having failed to realize any funds from the note and mortgage with which to pay the debt, and J. T. V. having been compelled to pay it: *held*, in a suit by J. T. V. against L., to enforce an application of the note and mortgage to the payment of the debt to her, that the delivery of the note and mortgage to B., as mentioned, constituted an appropriation of them for the purpose of paying the debt, and created an equitable lien thereon to the extent of Logsdon's liabilities, and that J. T. V. was entitled to a decree against L. for one half the amount paid by her in satisfaction of the debt, and to have the note and mortgage applied to that purpose. — *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUD; SCHOOLS; SPECIFIC PERFORMANCE; TAXATION, 3.

CORPORATIONS.

The creation of a body corporate for any purpose impliedly confers upon it the incidental powers belonging to a corporation; which includes the power to sue and be sued so far as necessary to maintain its corporate rights and enforce its corporate duties. — *Grant v. Lake Co.*, 453.

See COUNTIES, 1-3; RAILROADS; UNINCORPORATED SOCIETIES.

COSTS.

COSTS OF LITIGATION — DISCRETION OF COURT OVER IN EQUITY CASES. —

Held, further, W. A. having, in about two years from the time of the marriage, sold the premises to his brother, C. H. A., evidently for the purpose of ejecting L. A. therefrom, that L. A. had no standing in court to impeach the transaction as fraudulent in a suit to enforce a specific performance of the alleged agreement; but the court, having authority to direct as to the payment of costs in suits, will, where the conduct of a party has been shown to be unjust and oppressive, require him to pay the costs of the litigation. — *Adams v. Adams*, 248.

COUNTIES.

1. **ACTION AGAINST. —** An action at law cannot be maintained against a county unless authorized by statute. — *Grant v. Lake Co.*, 453.
2. Section 2239, Code of Miscellaneous Laws of Oregon, which provides that each county shall continue to be a body politic and corporate for certain purposes, authorizes an action to be maintained by or against a county for any cause affecting its rights or duties as such corporate body. — *Id.*
3. For the purposes for which a county is made a body corporate and politic, it is a person, and is capable of suing and being sued in regard to matters pertaining to those purposes, the same as an individual. — *Id.*
4. **CONSTITUTIONAL LAW — COUNTY — INDEBTEDNESS OF — WHEN VALID — COUNTY — LIABILITY OF UNDER LAW IMPOSING SAME. —** Where the legislative assembly of the state passed an act which provided that certain territory should be taken from the county of G. and annexed to the county of L., and that the treasurer of the county of L. should pay to the treasurer of the county of G. such portion of the indebtedness of the latter county as the taxable property of the territory taken bore to the whole amount of taxable property of said county of G., not to exceed five thousand dollars, as said taxable property appeared by the assessor's roll of the year 1884: *held*, notwithstanding the provisions contained in section 350 of the Code of Civil Procedure of the state, to the effect that an action could only be maintained against a county upon a contract made by such county in its corporate character; that an action was maintainable in favor of the county of G. against the county of L., to recover from the latter county such portion of the said indebtedness; that the legislative assembly had power in such a case to impose an obligation upon a county and the discharge of it becomes a corporate duty which could be enforced by an action at law, and that the right to such an action was not affected by said section 350 of the Code of Civil Procedure, which in terms limits

actions against counties to strict matters of contract; that it was known as a part of the history of legislation upon the subject that said section 350 was only intended to amend section 347 of the former code of the state, so as to avoid the consequences resulting from a construction the court had given said latter section, which was to the effect that it permitted actions to be maintained against counties for pretended injuries received by persons, by reason of alleged defects in bridges upon the public highways; *held, further*, that the fact that the indebtedness of the county of G. at the time of the passage of the said act exceeded the sum of five thousand dollars, did not support a finding of a conclusion of law; that the part of the indebtedness in excess of that sum was illegal and void; that the clause in the constitution of the state which provides "that no county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars," etc., does not imply that all debts and liabilities against a county over and above said sum are necessarily obnoxious to said provision; that the provision only applies to debts and liabilities beyond said sum which a county in its corporate character, and as an artificial person, voluntarily creates. — *Id.*

5. INTEREST TO PAY WHEN. — *Held, also*, that interest should not be allowed upon a claim against a county until a warrant therefor has been presented to the treasurer thereof, and an indorsement made thereon, "Not paid for want of funds," and the date of such presentment over the treasurer's signature. — *Id.*

COUNTY COURTS.

See HIGHWAYS; JURISDICTION, 3; PARENT AND CHILD.

COUNTY ROADS.

See HIGHWAYS.

CRIMINAL LAW.

1. AS A GENERAL RULE, IT IS SUFFICIENT TO CHARGE A STATUTORY OFFENSE in the words of the statute, but when a more particular statement is necessary to set forth the facts with requisite certainty, then the particulars must be averred. — *State of Oregon v. Lee*, 488.
2. THE FLIGHT OF AN ACCUSED is a circumstance, in connection with other facts in the case, from which a jury may draw unfavorable inferences, but it is a fact to be proven by a person who knows it. — *Id.*
3. DANGEROUS WEAPON — ASSAULT. — To point an unloaded gun at another, at a distance of from thirty to seventy yards, whereby such other is put in fear, and flees, is not an assault with a dangerous weapon. — *State v. Godfrey*, 300.
4. ASSAULT. — To constitute an assault, there must be an intentional attempt by violence to do injury to the person of another, and such attempt must be coupled with the present ability to do such injury. — *Id.*
5. DANGEROUS WEAPON DEFINED. — A dangerous weapon is one by the use of which death or great bodily harm may be inflicted. — *Id.*

6. **DANGEROUS WEAPON — UNLOADED GUN.**— An unloaded gun in the hands of the defendant, four or five rods from the prosecuting witness, is not a dangerous weapon. Without the use of a dangerous weapon the defendant could not commit the crime charged, and such weapon was not dangerous in a legal sense, unless at the time of its use it was capable of producing death or great bodily harm. — *Id.*
7. **LETHAL WEAPON — PROVINCE OF THE JURY.**— Guns, swords, pistols, knives, and the like, are lethal weapons, as a matter of law, when used within striking distance from the party assaulted; all others are lethal or not according to their capability of producing death or great bodily harm in the manner in which they are used, and of the jury must be the judges: *accordingly held*, that in this case if the gun was loaded, it was a lethal weapon; if otherwise, it was not. — *Id.*
8. **ASSAULT WITH A DANGEROUS WEAPON — INTENT.**— To constitute the crime of being armed with a dangerous weapon, and assaulting another with such weapon, no specific intent to inflict death or great bodily harm is necessary. No other intent is necessary than that which is embraced in the act of being armed with a dangerous weapon, and making an assault upon another with such weapon. — *Id.*
9. **WHEN THE CHARGE IS THE KILLING WITH A KNIFE,** and all the evidence, taken together, tends to identify the knife used in evidence as the one used by the prisoner, the question of the identity of the knife is exclusively for the jury. — *State v. Chee Gong*, 635.
10. **GAMBLING — INDIOTMENT — NAMES OF PARTICIPANTS.**— In an indictment for betting at a game played with cards called "stud-poker," it is not necessary to allege the names of other persons who bet at the game at the same time, or to allege that they are to the grand jury unknown. — *State v. Light*, 358.
11. **INDICTMENT — STATUTORY OFFENSE.**— In an indictment for a statutory offense, it is generally sufficient to follow the descriptive words of the statute defining the crime. — *Id.*
12. **DEALER — ACCOMPLICE.**— The dealer of a game of stud-poker is an accomplice with those who bet money or value at such game. Both are necessary to complete the offense, — each performing a separate and necessary part in the violation of the statute. The fact that each is punishable for the part he performs can make no difference as long as the concurrent acts of both are necessary to complete the violation of the statute. — *Id.*
13. **IN A COMPLAINT AGAINST A PARTY CHARGING HIM WITH AN OFFENSE** for an alleged violation of a city ordinance, made before a city tribunal authorized to take cognizance of such matters, the facts constituting the offense must be set out in the complaint as fully and completely as they are required to be stated in an indictment for a similar offense against the state. — *Cunningham v. Berry*, 622.
14. **IN A COMPLAINT CHARGING THE DEFENDANT WITH HAVING SOLD WHISKY** in Milton City in less quantities than one quart, and which complaint contained a statement that the selling was contrary to the force and effect of a certain section of a certain ordinance approved by its board of trustees, but did not contain any allegations or charge that the defendant sold the

whisky without having first obtained a license, agreeably to the provisions of the ordinance: *held*, that the complaint did not state facts sufficient to constitute an offense. *Held, also*, that the charter of said city, within the rule laid down by this court in *Barton v. City of La Grande*, decided at the present term thereof, did not authorize an appeal from a judgment of conviction rendered by the recorder of the city, and that consequently a writ of review was the proper remedy to revise such judgment. — *Id.*

15. A COMPLAINT UNDER A CITY ORDINANCE, which provides that any person or persons who shall be guilty of any violent, riotous, or disorderly conduct, or who shall use profane, abusive, or obscene language, in any street, house, or place within the city, whereby the peace or quiet of the city is or may be disturbed, shall, upon conviction thereof before the recorder, pay a fine, will not be sufficient to constitute an offense under such ordinance, unless it shows that the act was committed in a street, house, or similar place within the city. — *Barton v. La Grande*, 577.
16. THE GENERAL WORD "PLACE," AS USED IN THE ORDINANCE, must be construed to mean a definite locality within the city, of the same kind or nature as a street or house: — *Id.*
17. IN ACCORDANCE WITH THESE VIEWS, *held*, that the charter of the city of La Grande in the county of Union, Oregon, does not confer a right of appeal upon a party convicted of a violation of an ordinance of the city, and consequently that a writ of review will lie in such a case. Also, that where the complaint charged that the acts constituting the disorderly conduct prohibited by the ordinance were committed within the city, against its peace and dignity, but did not specify any definite locality therein where they were committed, that the complaint was not sufficient to support a conviction for a violation of such ordinance. — *Id.*

See APPEALS, 1, 9, 10; BAIL.

DAMAGES.

See SLANDER.

DAMS.

See WATERS, 17, 18.

DEEDS.

1. THE LAW ATTACHES TO ABSOLUTE DEEDS AND TRANSFERS a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law or equity. — *Miller v. Miller*, 423.
2. DEED INTENDED AS A MORTGAGE. — A party who takes a mortgage in the form of an absolute deed is bound to observe the most scrupulous good faith; and if questioned by a creditor of the mortgagor, or other person having an interest in knowing the fact, he must carefully and truly disclose the true nature of his security. An untruthful statement touching a material fact in relation to such security, or a failure to make a full and true disclosure when required, will postpone such security to that of a subsequent attaching creditor. — *Geary v. Porter*, 466.

3. **ID.** — A deed intended as a mortgage, while good between the parties, is to some extent a questionable security when the interests of third parties are concerned. It tends to cover up and keep concealed the real nature of the transaction between the parties, and will therefore be closely scrutinized. — *Id.*
4. **THE RULE THAT THE INTENTION OF THE PARTIES** to a deed of conveyance must be ascertained from the terms of the instrument and the circumstances surrounding the transaction applies to the case of a deed executed by a husband to his wife prior to the adoption of the statute enabling husbands and wives to convey real property from one to the other, and hence it is incompetent for the husband, after executing to his wife an absolute deed in form to such property, to testify in direct terms what he intended by it. — *Miller v. Miller*, 423.
5. **EQUITY — CORRECTION OF MISTAKE IN DEED AGAINST HEIR OF GRANTOR.** — The grantor in a deed may have a mistake in such a deed corrected against the heir at law of the grantee therein. — *Savage v. McCorkle*, 42.
6. **MISTAKE — MAINTENANCE.** — Where it was agreed that a part of the consideration for a deed was the support of the grantors by the grantees while they lived, and that the same should be inserted in the deed, but by mutual mistake was omitted, the grantors in such a deed may have the same corrected by a suit for that purpose against the grantee or his successor, who paid no value or took with notice. — *Id.*
7. **CONSIDERATION RECITED IN — PAROL EVIDENCE TO VARY — EFFECT OF.** — A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration had been received by the grantor; nor can it be shown by such evidence that the object or purpose of a deed duly delivered to the grantee was different from that implied by its terms, unless executed to secure the payment of a debt or the performance of some other act. — *Finlayson v. Finlayson*, 347.
8. **MAY BE SET ASIDE FOR FRAUD OR DURESS, WHEN — RESULTING TRUST.** — A deed may be set aside for fraud or duress, and a trust may arise out of a transaction which will be enforced in face of the express terms of a deed, but it must be a trust arising by operation of law. The parties to a deed cannot create a trust in favor of the grantor except by an instrument in writing declaring the same. — *Id.*

See HUSBAND AND WIFE; TAXATION, 1.

DEMURRER.

See PLEADING AND PRACTICE.

DEPOSITIONS.

1. **PRACTICE — DEPOSITION BY PARTY IN HIS OWN BEHALF — WITNESS.** — A person who is a party to an action is also a competent witness therein, and his deposition may be taken in his own behalf in any of the cases specified in section 814, Hill's Code, applicable to the circumstances or condition of such witness. — *Roberts v. Parrish*, 583.

2. **DEPOSITIONS TAKEN BY ADVERSE PARTY.**—Subdivision 1, section 814, Hill's Code confers the power and authority on either party to an action or proceeding to take the depositions of "the adverse party." It confers a right that has no existence outside of this statute, but it in no manner restricts the right of either party to take the deposition of any witness in the cases enumerated in the section. — *Id.*
3. **BILL OF EXCEPTIONS.**—The recital in the bill of exceptions that a certain deposition is made part of it is ineffectual for any purpose, unless such deposition is annexed to the bill of exceptions, and in some manner marked or indented as an exhibit. — *Id.*

DESERTION.

See **DIVORCE**, 1.

DIVORCE.

1. **WILLFUL DESERTION—DIVORCE.**—Willful desertion is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. — *Sisemore v. Sisemore*, 542.
2. **EFFECT OF DECREE IN SUIT FOR.**—In a divorce suit, the real property which comes to the wife as a result of the divorce is not the subject-matter of the litigation. The court has no jurisdiction to affect or divest the title of the husband to lands owned by him, or to decree one third of them to the wife, independent of a decree for divorce. Nor has the plaintiff any title upon which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for a divorce: *Houston v. Timmerman*, 499.
3. **ALIMONY PENDING.**—Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be divested during the pendency of the litigation, but only when a decree has been rendered that the marriage is dissolved. — *Id.*
4. **WHAT DECREE MUST STATE.**—It is "whenever a marriage shall be declared dissolved" that the statute operates, —not before, or *pendente lite*, —and the court is then authorized and it becomes its "duty" "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce. — *Id.*
5. **REAL PROPERTY OF PARTIES, WHEN AFFECTED BY.**—While the prosecution of a divorce suit might terminate in a decree which would affect, as a result thereof, the property of the defendant, such real property is not the specific subject of the controversy, and by reason thereof is not withdrawn from such burdens as may be legally imposed upon it for just claims upon judgments recovered and docketed against its owner prior to divesting him of his title by force of the statute under the decree for a divorce. — *Id.*
6. It results that a purchaser of such lands at an execution sale upon such judgment is not affected by or subject to the rule of *lis pendens*. — *Id.*

7. DECREE IN DIVORCE CASES — EFFECT OF ON REAL ESTATE OF PARTY IN THE WRONG. — While, since the decision in *Bamford v. Bamford*, 4 Or. 30, it has been deemed essential, to reach the property of the guilty party, that such property should be described in the complaint and decree, yet it is doubtful whether any such allegation is necessary, but that it is a sufficient compliance with the last clause of section 499, Oregon Code, to say, in effect, that the party obtaining the divorce is thereby entitled to one third of the real property owned by the other. — *Id.*
8. *Id.* — In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purchase between the parties interested much better than in a divorce suit, in which it is neither convenient nor proper that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding. — *Id.*

DURESS.

See DEEDS, 8.

EJECTMENT.

See WATERS, 1.

ELECTIONS.

1. BALLOT-PAPER — DUTY OF SECRETARY OF STATE. — Section 2507 of Hill's Code has shifted the duty of selecting suitable ballot-paper from the individual voter to the secretary of state. — *State v. Wolf*, 119.
2. BALLOT-PAPER — USE OF SURPLUS AT SUCCEEDING ELECTIONS. — Under section 2507, *supra*, a political committee may purchase of the secretary of state "such quantity or amount of paper as may be necessary or convenient," and its use is not limited to a pending election or the one next ensuing. The surplus, if any, may be used at any subsequent election. — *Id.*
3. TINTED PAPER — SECRETARY OF STATE. — If tinted paper be selected by the secretary of state and furnished for ballot-paper, ballots printed upon it are lawful, and must be counted. — *Id.*
4. VOTERS — BEST EVIDENCE OF THE INTENTION OF. — It is a primary rule of elections that the ballots constitute the best, the primary evidence of the intention and choice of the voters. — *Hartman v. Young*, 150.
5. BALLOTS — MUST BE PRESERVED FROM TAMPERING — OFFICIAL COUNT. — In determining a contested election, the evidence of the ballots actually cast will control that furnished by the official count, provided the ballots have been preserved and protected from tampering. — *Id.*
6. OFFICIAL RETURNS — PRIMA FACIE EVIDENCE OF RESULT OF ELECTION. — The official returns when duly certified are *prima facie* evidence that the result is as declared, but such returns or canvass is never conclusive, unless made so by statute. As a *quasi* record, it is entitled to the presumption of regularity, and is *prima facie* evidence of its integrity. — *Id.*

7. ELECTION CONTEST — BALLOTS BEST EVIDENCE. — As between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence. — *Id.*
8. ONUS PROBANDI — PLAINTIFF MUST PROVE THAT BALLOTS OFFERED TO IMPEACH THE OFFICIAL COUNT ARE GENUINE. — The burden of proof rests on the plaintiff. He must establish to the satisfaction of the jury or trial court that the ballots have been kept intact, and are the genuine, identical ballots cast at the election, otherwise they will receive no credence and be rejected as unworthy of credit. — *Id.*
9. STATUTE — DIRECTORY WHEN. — Provisions of the statute for the safe-keeping of ballots are treated by the courts as directory, and when it is shown that the ballots have been securely kept and preserved inviolate, they will not be excluded as evidence on account of some omission to comply with their directions. — *Id.*
10. BALLOT-BOX — PRESERVING OF THE BALLOTS. — Where the court finds that the ballots have been safely kept and preserved, that no one has tampered with them, and notwithstanding the opening of the box for the purpose stated, that the ballots were the genuine and identical ballots cast by the voters of South Pendleton precinct, the legal conclusion drawn therefrom by the trial court, viz., that "such ballots are the best evidence, and entitled to be recounted," is in conformity with law, and such as it pronounces on that state of facts. — *Id.*
11. ELECTION CONTEST — LAWS FOR — SUMMARY. — The intention of the contested election laws is to furnish a summary remedy and to secure a speedy trial, that the title to the office in dispute may be determined before the official term expires in whole or in large part, and that the will of the people may not be defeated in the choice of their officers. — *Whitney v. Blackburn*, 564.
12. ID. — FOUNDATION OF SUIT — WHAT IS. — In proceedings of this kind, the notice of contest is the foundation of the suit, and performs the double office of a summons and complaint, and should contain the title of the cause, specifying the name of the court and the parties to the contest, and must be served and filed within thirty days. — *Id.*
13. EVIDENCE — ELECTION CONTEST — ONUS PROBANDI. — The law is well settled that the burden of proof is on the plaintiff, when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the genuine ballots cast by the voters. — *Fenton v. Scott*, 199.
14. ID. — BALLOTS BEST EVIDENCE OF INTENTION OF VOTER. — IDENTITY OF MUST BE FIXED BEYOND REASONABLE DOUBT. — While the ballots when identified are the best evidence and are to prevail over the official count, yet to entitle them to be resorted to and be recounted, the facts going to show their preservation must fix their identity beyond all reasonable doubt. — *Id.*
15. BALLOTS PROOF OF IDENTITY — CHARACTER OF EVIDENCE TO ENTITLE SAME TO BE RECEIVED. — But this does not require that they must be proved genuine beyond all possible doubt, or beyond a mere possibility that they might have been interfered with. All that is required is that they be

- proved intact and genuine, with a reasonable degree of certainty, and to the full satisfaction of the court. — *Id.*
16. EVIDENCE — BALLOTS, PROOF OF IDENTITY OF. — Where the facts found do not disclose affirmatively that the ballots have been so safely preserved as to satisfy the trial court, beyond reasonable doubt, of their integrity or identity, and as a legal consequence refuses to recount them to overturn the official count: *held*, that their rejection was no error. — *Id.*
17. VOTER — INTENTION OF. — Where a ballot discloses a name written opposite to a printed name erased, the intention of the voter is to substitute the written for the erased name. — *Id.*
18. ID. — WHERE UPON A BALLOT THE NAMES OF TWO REPRESENTATIVES were erased, and opposite, but slantingly, in consequence of the narrow margin upon which to write, two other names are written, and one of the names so written was a candidate for county judge on another ticket, but the printed name of the county judge on such ticket was not erased: *held*, that the facts did not disclose a case within the provisions of section 2528, Oregon Code. — *Id.*
19. ELECTION CONTEST — STATEMENT OF — CAUSE OF. — "Stating the cause of such contest briefly" is stating briefly the facts or combination of facts which give rise to the right of contest, and this necessarily implies that such fact shall be stated sufficiently plain as to advise the defendant of the "cause" for which his election is contested. — *Whitney v. Blackburn*, 564.
20. ID. — NOTICE OF — ITS PURPOSE. — As the object of the notice is to inform the other party of the substance of the facts relied upon to defeat his claim, certainty is required, but not technical precision of averment, and when the words used therein, taken in their ordinary sense, fairly serve this purpose, it is sufficient. — *Id.*
21. STATUTE LAW — HOW CONSTRUED. — While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the statute concerning contested elections, that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which such other has been declared elected, by a tribunal authorized by the people, ought to have some well-defined "cause," and to be able to state it with sufficient certainty so to notify and inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry. — *Id.*

EMINENT DOMAIN.

- WHENEVER IT IS PROPOSED TO APPROPRIATE THE LANDS OF THE CITIZEN TO A PUBLIC USE, the proceeding by which it is to be done must conform to the requirements of the statute, and contain such a description of the lands to be so taken as may be ascertained from its record. — *Ames v. Union Co.*, 600.

See HIGHWAYS.

EQUITY.

1. A SUIT IN EQUITY CANNOT BE MAINTAINED BY A LOT-OWNER in any incorporate city against the officers thereof to restrain proceedings in the

improvement of a street therein on which such lot abuts, upon an apprehension that the officer will attempt to charge a part of the expense of the improvement upon the lot. Such suit can only be maintained where there has been an attempt under the proceedings to sell the lot, or the proceedings are of a character that they necessarily will cast a cloud upon the title of the lot-owner. — *Sperry v. City of Albina*, 481.

2. **EQUITY — COGNIZANCE OF IN CASE OF TRESPASS.** — Equity will not take cognizance of an ordinary matter of trespass, or of the violation of any legal right, unless the circumstances are of such a character as to bring the case under some recognized head of equity jurisdiction. Equity will, however, afford a remedy in such cases where the remedy at law is incomplete and inadequate to give such relief as the nature of the case demands. — *Haines v. Hall*, 165.

See **CONTRACTS**, 2; **COSTS**; **DEEDS**, 5, 6; **INJUNCTIONS**; **JUDGMENTS**; **MORTGAGES**, 2; **PARTNERSHIP**, 2; **SPECIFIC PERFORMANCE**; **TRUSTS**.

ESTATES OF DECEDENTS.

See **EXECUTORS AND ADMINISTRATORS**; **WILLS**.

ESTOPPEL.

MUTUALITY. — Estoppels to be binding must be mutual. — *Ferguson v. Jones*, 204.

See **RES ADJUDICATA**.

EVIDENCE.

1. **EFFECT OF EVIDENCE — PROVINCE OF THE JURY.** — It is the right of the jury, and not of the court, to determine the effect of evidence, unless in particular cases where its effect is declared by law. — *Patterson v. Hayden*, 238.
2. **LETTER NOT A WRITTEN INSTRUMENT — RIGHTS OF THE JURY.** — It is the duty of the trial court to declare the legal effect of all written instruments submitted in evidence; but a letter is not generally such an instrument. To make it such, it must constitute a contract. An ordinary letter is to be dealt with by the jury like any other act, statement, or admission of a party; i. e., the jury is to give it such effect as they may think, under all the circumstances, it ought to receive. — *Church v. Melville*, 413.
3. **LETTER — EFFECT OF AS EVIDENCE.** — The letter written by the plaintiff in relation to the property in controversy was, under the circumstances, a fact to go the jury on the question of title, to be weighed and considered by them, in connection with the other facts of the case, but it was not necessarily conclusive. — *Id.*
4. **INSTRUCTIONS.** — Unless evidence is by law conclusive upon the parties, it would be error for the trial court to select a single fact or part of the evidence where there was a conflict, and instruct the jury that they must find their verdict on that fact alone, and in a particular way. Such an instruction would be an invasion of the rights of the jury. — *Id.*

5. **THE DISTINCTION BETWEEN A MAP OR PLAN** not admitted in evidence, but used only to enable the witness to explain the different points, location, etc., as to which he testifies, and such a map admitted as evidence of the *locus in quo* noted. — *State v. Chee Gong*, 635.

See ACCOUNTS, 3; CONTRACTS, 1; CRIMINAL LAW; DEEDS; DEPOSITIONS; ELECTIONS; PARTNERSHIP; SLANDER; TRUSTS; WILLS; WITNESSES.

EXECUTIONS.

1. **SHERIFF'S DUTY — EXECUTION.** — After receiving an execution in an action where property has been attached and delivered to a claimant upon executing the usual undertaking, the limit of the sheriff's duty is to make a demand for the property bonded, and if the same is not delivered to him, to make a return of all his proceedings to the court. — *Kohn v. Hinshaw*, 308.
2. **FAILURE OF THE CLAIMANT TO DELIVER THE PROPERTY — PLAINTIFF'S REMEDY.** — If the claimant fail to deliver the property attached according to the terms of his undertaking, the plaintiff may bring an action on such undertaking in his own name. He is the person for whose benefit such undertaking was executed, and is the real party in interest. — *Id.*

See ATTACHMENT AND GARNISHMENT; PARTNERSHIP, 3, 4.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR OF ADMINISTRATOR, WHEN NOT LIABLE TO ACCOUNT.** — W. A. B. was administrator with will annexed of G. J. B., deceased. He filed his final account as such, but before he obtained an order discharging him from his trust, he died. Mary L. B. qualified as administratrix of W. A. B., deceased. E. C. C. qualified as administrator *de bonis non* with will annexed of G. J. B., deceased, and then filed the petition in this case. *Held*, that where it is not charged that any of the property or assets of G. J. B., deceased, came into the possession or under the control of Mary L. B., she cannot be called upon to file an account; that her trust as administratrix of W. A. B., deceased, does not create the duty to file an account in the estate of G. J. B., deceased. (On rehearing.) — *Cross v. Baskett*, 84.
2. **DECREE APPROVING FINAL ACCOUNT OF EXECUTOR.** — A decree approving the final account of an executor or administrator is only primary evidence of the correctness of the account as thereby settled and allowed. (1 Hill's Code, sec. 674, 1175.) Such decree is not conclusive, but *prima facie* evidence only on rehearing. (*Id.*) — *Id.*

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION, 2.

FORFEITURES.

VIOLATION OF CONDITION ON WHICH FORFEITURE CLAIMED — MUST BE ASSERTED ACTIVELY. — To authorize a person to claim a forfeiture of valuable property rights on account of the violation of a condition upon which

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they are granted, he must proceed to enforce it at once. He cannot remain passive for a long time after acts have transpired upon which others have relied in matters of importance to them, and then insist upon the forfeiture in consequence thereof. — *Huston v. Bybee*, 140.

See BAIL, 5.

FRAUD.

EQUALITY OF FOOTING OF PARTIES.—Fraud will vitiate a contract; but where the parties to the contract stand upon an equality of footing, the fraud must consist of a false representation of a material fact, and the party to whom it is made not be able, by the exercise of a reasonable caution and vigilance, to detect its falsity. — *Finlayson v. Finlayson*, 347.

See DEEDS, 8.

GAMBLING.

See CRIMINAL LAW, 10-12.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT.

GUARDIAN AND WARD.

1. **STEP-FATHER — GUARDIAN.**—If a step-father never assumed said duty but qualified as the guardian of the step-child, and as such guardian furnished it with necessaries and charged for them in his accounts as such guardian, the presumption that he acted or intended to act *in loco parentis* is rebutted. — *Cerber v. Bauerline*, 115.
2. **IMPROVEMENTS ON MINOR'S PROPERTY — CLAIM OF GUARDIAN FOR.**—The ordinary rule is, that a guardian will not be allowed for permanent improvements placed by him on a minor's property without authority. — *Id.*

HIGHWAYS.

1. **IN A PETITION TO LAY OUT A ROAD**, the beginning, the intermediate points, if any, and the termination, must be certain, otherwise the county court will not acquire jurisdiction. — *Ames v. Union Co.*, 600.
2. **WHERE THE COURSE OF THE ROAD** from the last point to its termination is described as "thence northwesterly," it is not meant that the road must run in a direct line to the point of ending, but that the route of the proposed road will be in a northwesterly direction; and so long as this is preserved by the viewers, though there be some deviation from the direct line, the description is sufficiently certain to give the requisite information to those liable to be affected by its establishment. — *Id.*
3. **COUNTY COURT — JURISDICTION OF IN ESTABLISHING PUBLIC ROAD.**—In order to confer upon a county court jurisdiction to lay out a county road, application by petition must be made to the court, signed by at least twelve householders of the county where the road is laid out, which petition shall specify the place of beginning, the intermediate points, if any, and the place of its termination so definitely and certainly that a person

of ordinary intelligence need not mistake their location. — *Woodruff v. Douglas Co.*, 314.

4. **COUNTY ROAD—TERMINAL POINT—DESCRIPTION OF.** — Where in an application to a county court to lay out a county road, the terminal point was described in the petition as the point of intersection of the last course with the present C. V. and R. C. road, between the residence of C. L. P. and O. B.: *held*, that it did not answer the requirements of the statute in that particular, and consequently did not vest the county court with jurisdiction to lay out and establish the proposed road. — *Id.*
5. **JURISDICTION OF CIRCUIT COURT—WRIT OF REVIEW.** — *Held*, also, that the circuit court, upon a writ of review to review the proceedings in laying out and locating the said road under the said application and petition, had no jurisdiction to adjudge that said writ should be dismissed and said proceedings should be in all things affirmed. — *Id.*
6. **COUNTY ROAD—PETITION FOR—"HOUSEHOLDERS."** — Section 4062, Hill's Code, does not require that a petition for the location of a county road should declare upon its face that those who sign it are *householders*. It must be *signed* by twelve or more householders, and the fact that it is so signed may be proven by any competent evidence. Such petition is good if it specify the place of beginning, the intermediate points, if any, and the place of termination of said road. — *Bewley v. Graves*, 274.
7. **COUNTY COURT—JURISDICTION.** — A county court acquires jurisdiction to lay out a county road by the presentation of a petition containing the statutory requisites, signed by twelve or more qualified petitioners, accompanied by a proper notice and proof that the same had been stuck up as required by law. — *Id.*
8. **NAMES ON PETITION AND NOTICE—VARIANCE.** — An immaterial variance between the name on the petition and notice is not a jurisdictional defect, and will not render the proceedings void. — *Id.*
9. **COUNTY COURTS—WHEN COURTS OF LIMITED AND INFERIOR JURISDICTION.** — When county courts exercise the power conferred by statute to lay out county roads, they are courts of limited and inferior jurisdiction. — *Id.*

HOLIDAYS.

See PROCESS, 4.

HUSBAND AND WIFE.

1. **A DEED FROM A HUSBAND TO HIS WIFE** was a nullity at common law, upon the ground that it regarded them as but one person; but equity regarded them for many purposes as a duality, and enforced such deeds, when intended by the husband as a provision or settlement in favor of the wife, where the rights of creditors were not affected thereby, and the conveyance in other respects was fair and just. Nor was it necessary, in order to uphold such a deed, that it should be a formal deed of settlement; the presumption was, where the conveyance was by an ordinary deed, that it was intended as an advancement and provision for the wife. — *Miller v. Miller*, 423.

2. IT WAS NOT NECESSARY, in order to give the wife a separate use in the property, that the conveyance from the husband to her should contain words indicating such intention, for the law presumed that it was intended for her separate and exclusive use. — *Id.*
- WHERE C. S. M. EXECUTED TO HIS WIFE, M. E. M., a deed of conveyance to certain real property, and the deed purported to be in consideration of the receipt of one dollar, and in compliance with a certain promise and agreement theretofore made, and contained an *habendum* clause to the effect that she was to *have and hold* the property to herself and her heirs and assigns forever: *held*, that he was precluded from claiming — without alleging fraud or mistake — that there was no consideration for the deed; *held further*, that the deed created in equity a trust in the premises in favor of the wife. But as the facts and circumstances showed that it was evidently intended as a provision for the wife and their children, which he was also expected to enjoy; and the evidence in the case strongly indicating that the wife had not remained faithful to her husband; that her affections for him had become alienated, resulting finally in a dissolution of the marriage ties between them: *held*, that equity ought not to aid her in the enforcement of the trust, where the court was not satisfied that it was created for a valuable consideration, except as to a certain class of debts incurred by the wife for the support of the family, and in making permanent improvements upon the premises which she had attempted to charge upon the property. — *Id.*
4. IMPROVEMENT OF WIFE'S PROPERTY BY HUSBAND. — Where a wife urged and importuned her husband to convey to her, in her own right, valuable premises which the husband had acquired by the joint efforts of both since their marriage, and the husband was induced to make the conveyance through such urging and importunity and the assurances of the wife that he should enjoy them with her as a home the same as he had previously; and after the conveyance was made she induced him by similar assurances to build a new house upon the premises and otherwise improve them, at an expense to the husband of four thousand dollars, and after living upon the premises as they usually had done for three years and a half, difficulty arose between them, resulting in her expelling him therefrom: *held*, that her persuasion, importunities, and assurances, and her subsequent conduct in expelling him from the premises, did not constitute a fraud that would justify a court of equity in setting aside the deed of conveyance; but *held further*, that the amount of the expenses incurred by the husband in building the house and in improving the property should be paid to him by the wife, and should be made a charge upon the premises in his favor. — *Finlayson v. Finlayson*, 347.

INDIOTMENTS.

See CRIMINAL LAW.

INFANCY.

MINOR DEFENDANT — COMPROMISE — DECREE. — In such suit a minor defendant may, with the consent of the court, enter into a stipulation by his

guardian by way of compromise, and a decree entered on such stipulation will be binding on such minor to the same extent and have the same effect as if he were of full age. *Seemle*, that a decree, entered without such consent, remaining unimpeached and unreversed, has the same effect, and such infant will not be permitted to dispute it, except upon the grounds that would be available to him if he were an adult. — *Savage v. McCorkle*, 42.

See GUARDIAN AND WARD; PARENT AND CHILD.

INJUNCTIONS.

1. MERE TRESPASS NOT ENJOINED. — The ordinary rule is, that a mere trespass will not be enjoined. Something more is necessary before equity will interfere, such as preventing irreparable injury, avoiding multiplicity of suits, and the like. — *Haines v. Hall*, 165.
2. TORTS — WHEN NOT ENJOINED. — Ordinary wrongs or torts are never enjoined. The damages or injury sustained from them are not generally irreparable, and a party will be left to his remedy at law. *Seemle*, when the injury complained of reaches the very substance and value of the estate and goes to the destruction of it, in the character in which it is enjoyed. — *Id.*

See EQUITY, 1.

INSOLVENCY.

DISCHARGE OF INSOLVENT — EFFECT OF AS AGAINST FOREIGNER NOT PARTY TO PROCEEDINGS. — A discharge in insolvency by an insolvent court of this state to one of its citizens is no bar to an action brought by a citizen of another state in the courts of this state when such creditor was not a party to the insolvency proceedings. — *Main v. Messner*, 78.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

INSTRUCTIONS.

See APPEALS, 16-18; EVIDENCE; PLEADING AND PRACTICE, 13.

INTENT.

See CRIMINAL LAW, 8.

INTEREST.

See COUNTIES, 5.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 13, 14.

IRRIGATION.

See WATERS, 2-7.

JOINT CONTRACTS.

See CONTRACTS.

JUDGMENTS.

1. **DECREE WITHOUT JURISDICTION.** — No person shall be personally bound by a decree until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. A judgement without such citation and opportunity wants all the attributes of a judicial determination. — *Furgeson v. Jones*, 204.
2. **DECREE — PARTIES — PRIVIES.** — A decree is valid and binding between the parties to it and those in privity with them; but it in no manner affects strangers. They can neither be benefited nor prejudiced by it. — *Savage v. McCorkle*, 42.
3. **CASE IN JUDGMENT.** — Where a decree settled and fixed the liability of the defendant therein to support and maintain the plaintiffs while they lived, one who was not a party to such decree cannot furnish maintenance to the plaintiffs without the defendant's request, and compel the defendant to pay the same directly to him. Such person is a stranger to the decree, and not in privity with any of the parties to it. — *Id.*

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; DIVORCE; JURISDICTION; RES ADJUDICATA; STARE DECISIS.

JURISDICTION.

1. **THERE IS A MARKED DISTINCTION** between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction, but jurisdiction does not attach until the conditions upon which it depends are fulfilled. Hence a decree rendered without jurisdiction does not estop any one, and may be collaterally assailed in any action. — *Furgeson v. Jones*, 204.
2. **ANSWER.** — Where the complaint presents a case within the jurisdiction of the court, and the answer pleads facts showing it to be beyond its jurisdiction, the plaintiff is entitled to have the case tried, and if the defendant should sustain his answer by proof upon the trial, the only effect of such trial finding would be, that the plaintiff could obtain no relief, and the action would be dismissed. — *Corbell v. Childers*, 528.
3. **COUNTY COURTS — INTENDMENTS AS TO JURISDICTION.** — When the fact of jurisdiction is shown, courts of limited and inferior jurisdiction have the same intendment in favor of their proceedings that the courts of general jurisdiction have. — *Bewley v. Graves*, 274.
4. **NON-RESIDENT — NO PRESUMPTION OF JURISDICTION WHERE THE RECORD IS SILENT.** — Where it affirmatively appears that an adverse party to a decree was a non-resident of the state at the time of its rendition, and the record is silent as to his appearance or notice, there is no presumption that such court acquired jurisdiction over his person. — *Furgeson v. Jones*, 204.
5. **COURT — GENERAL JURISDICTION — SUMMARY POWERS CONFERRED BY STATUTE.** — Where a court of general jurisdiction has summary powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are no part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. — *Id.*

6. TRANSITORY ACTIONS—JURISDICTION. — All actions not required to be commenced and tried in the county in which the subject of the action or some part thereof is situated, or which are not for a penalty or forfeiture imposed by statute, or are not against a public officer or person appointed to execute his duties for an act done by him in virtue of his office, etc., must be commenced in the county in which the defendants or either of them reside or may be found at the commencement of the action, and the court will not acquire jurisdiction over the person of the defendant unless so commenced. — *Dunkam v. Schindler*, 256.

See APPEALS, 15; HIGHWAYS; JUDGMENTS; PARENT AND CHILD, 1; REPLEVIN; SLANDER.

JURY AND JURORS.

See EVIDENCE; VERDICT.

LANDLORD AND TENANT.

See SPECIFIC PERFORMANCE; STATUTE OF FRAUDS, 5.

LEASE.

See SPECIFIC PERFORMANCE; STATUTE OF FRAUDS, 5.

LIENS.

See ATTACHMENT AND GARNISHMENT, 2; MORTGAGES.

LETTERS.

See EVIDENCE, 2, 3.

LIS PENDENS.

1. WHAT FOUNDED UPON. — Strictly speaking, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. — *Houston v. Timmerman*, 499.
2. OBJECT AND PURPOSE OF DOCTRINE OF. — The purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgment of decree. — *Id.*
3. SUBJECT-MATTER OF SUIT. — The general rule is, that one who purchases of either party to the suit the subject-matter of the litigation after the court has acquired jurisdiction, is bound by the judgment or decree, whether he purchased for a valuable consideration or not, or without any express or implied notice in point of fact. — *Id.*
4. WHAT ESSENTIAL TO. — Two things seem indispensable to give effect to the doctrine of *lis pendens*: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation. — *Id.*

See DIVORCE, 6.

MALICIOUS PROSECUTION.

1. COMPLAINT FOR — MUST SHOW TERMINATION OF PROSECUTION. — An action for malicious prosecution, where the court in which the prosecution occurred had jurisdiction of the subject-matter and of the person, cannot be maintained unless the prosecution has been terminated by the acquittal of the plaintiff in the action. The principle which requires the prosecution to have been terminated favorably to the plaintiff before he can maintain an action therefor is, that while the prosecution is pending undetermined, or when it has been determined adversely to the plaintiff in the action, the want of probable cause therefor cannot be shown in a collateral suit. The proceedings in the prosecution are evidence of their own rectitude until set aside in the due course thereof. — *Foster v. Orr*, 447.
2. MALICIOUS PROSECUTION AND FALSE IMPRISONMENT DISTINGUISHED. — The same principle which is applicable to actions for malicious prosecution applies also to actions for malicious arrest issued in a civil action; hence where F. commenced an action against O. for having falsely and maliciously, and without any reasonable or probable cause therefor, procured a writ of arrest to be issued in an action brought by O. against F., whereby the latter was arrested and imprisoned, and the proceedings were regular on their face: *held*, that the failure of the complaint to show that the writ of arrest had been vacated or set aside by the court in the action in which it was issued was a fatal defect, and that the complaint was insufficient to sustain a recovery had thereon. *Held further*, that an allegation in the answer, to the effect that the plaintiff, after being arrested upon the writ of arrest, paid the defendant's demand on account of which he was arrested, and the disbursements of the proceedings against him did not aid the complaint in respect to such defect, but on the contrary, showed that the arrest was acquiesced in by the plaintiff. And the plaintiff not having denied in his reply the said allegation in the answer, *held*, that under the pleadings he had no cause of action. — *Id.*

MANDAMUS.

See OFFICE AND OFFICERS, 2

MAPS.

See EVIDENCE, 5.

MARRIAGE AND DIVORCE.

See DIVORCE; STATUTE OF FRAUDS, 3, 4.

MARRIAGE SETTLEMENTS.

See SPECIFIC PERFORMANCE, 5.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See PARENT AND CHILD, 7.

MINORS.

See GARDIAN AND WARD; INFANCY; PARENT AND CHILD.

MISTAKE.

See BOUNDARIES; DEEDS, 5, 6.

MORTGAGES.

1. **MORTGAGED PROPERTY — IDENTIFICATION OF — WHEN MORTGAGED.** — In order to mortgage property, so as to create a lien upon it, such property must be ascertained and identified at the time of the execution of the instrument. — *Lee v. Cole*, 559.
2. **EQUITABLE MORTGAGE — IDENTIFICATION OF THE PROPERTY.** — Where an equitable mortgage is claimed as the result of an agreement, there must be, at the time such agreement was made, such an identification of the property as that the equitable mortgagees may say, with a reasonable degree of certainty, what property it is that is subject to their lien. — *Id.*

See DEEDS, 2-3.

MUNICIPAL CORPORATIONS.

See APPEALS, 1; CRIMINAL LAW, 13-17.

NAVIGABLE WATERS.

See WATERS.

NEGLIGENCE.

See RAILROADS, 1-3; SHERIFFS.

NEGOTIABLE INSTRUMENTS.

PROMISSORY NOTE — INDORSEMENT FOR COLLECTION. — The indorsement of a promissory note for collection passes such title to the indorsee as will enable him to sue thereon in his own name, though he paid nothing for such note, but in such case he will hold said note subject to the same defenses that could have been made to it in the hands of the original payee. — *Roberts v. Parriah*, 583.

NON-RESIDENTS.

See INSOLVENCY; JURISDICTION, 4.

NOTICE.

See APPEALS, 14-17; LIS PENDENS.

OFFICE AND OFFICERS.

1. **REMOVAL FOR CAUSE — IS THE POWER JUDICIAL OR EXECUTIVE? — THE QUESTION STATED, BUT NOT DECIDED — OPPORTUNITY TO BE HEARD.** — Whether the power to remove an officer *for cause* may be conferred upon

the governor, or belongs exclusively to the judicial department of the government under the constitution, is not decided; but by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense. — *Biggs v. McBride*, 640.

2. TRIAL — TITLE TO OFFICE — MANDAMUS. — *Mandamus* is not the proper proceeding by which to try the title to an office. — *Id.*

See CONSTITUTIONAL LAW.

ORDINANCES.

See CRIMINAL LAW, 13-17.

PARENT AND CHILD.

1. COUNTY COURT — JURISDICTION — WHAT NECESSARY. — To give a decree of the county court adopting a child any validity, such court must have acquired jurisdiction (1) over the parties seeking to adopt such child, and (2) over the child to be adopted, and (3) over the parents of such child. — *Ferguson v. Jones*, 204.
2. CONSENT LIES AT THE FOUNDATION OF STATUTES OF ADOPTION, and when it is required to be given and submitted, the court cannot take jurisdiction of the subject-matter without it. — *Id.*
3. UNDER OUR STATUTES, WHEN THE PARENTS ARE LIVING and do not belong to the excepted classes, such consent must be given, and is a prerequisite to jurisdiction. — *Id.*
4. ADOPTION OF CHILD — STATUTORY REQUIREMENTS. — A child by adoption cannot inherit from the parent by adoption unless the act of adoption is done in strict accordance with the statute. — *Id.*
5. THE RIGHT OF ADOPTION WAS UNKNOWN to the common law, and repugnant to its principles. Such right, being in derogation of the common law, is a special power conferred by statute, and the rule is, that such statutes must be strictly construed. (On rehearing.) — *Id.*
6. SUPPORT OF STEP-CHILD — STEP-FATHER. — The law does not impose upon a step-father the duty of supporting a step-child, nor is he by virtue of such relation entitled to demand its services. — *Gerber v. Bauerline*, 114.
7. STEP-FATHER — IN LOCO PARENTIS. — If a step-father voluntarily assumes the care and support of a step-child, he stands *in loco parentis* to such child, and the presumption then is that they deal as parent and child, and not as master and servant. — *Id.*

See GUARDIAN AND WARD; WILLS, 7.

PARTIES.

See CORPORATIONS; COUNTIES; INFANCY; PARTNERSHIP.

PARTNERSHIP.

1. WHAT IS — SURETY — INDEMNITY OF. — Where H., party of the first part, and J. and others, parties of the second part, entered into written articles

of agreement, which provided, in substance, that the first party should buy and manage a store, warehouse, and other business at a certain place for the benefit of the public and of the second parties; that in return therefor the second parties should become security for the stock of goods and warehouse rent until the goods were paid for; that the goods and storehouse should not be considered the property of the first part until the goods were paid for, but simply held in trust by the first party for the second parties; that the second parties should have the right to appoint a qualified person to assist in the management of the business; that the first party should only draw out of the business current living expenses, and should make a report every thirty days to the second parties of the condition of the business; that the stock should be kept up to what the trade required, and of the receipts of the business; and that the remainder of the receipts should be applied upon the principal and interest of the debt; which agreement concluded with a provision that a failure to comply should forfeit all interest in the firm; that the name of the firm should be H. & Co.: *held*, that the language of the agreement, taken by itself, did not indicate that the parties intended to form a partnership; but only indicated that the second parties intended to become security for the first party for the stock of goods and for the rent of the warehouse, and to hold a claim upon the property as an indemnity against loss in consequence thereof.— *Kosterman v. Hayes*, 325.

2. EQUITY — PURCHASER OF INTEREST OF PARTNER IN COPARTNERSHIP PROPERTY MAY MAINTAIN SUIT TO HAVE SAME DECLARED.— The purchaser of partnership property at a sale upon an execution against an individual member of a copartnership firm is entitled to maintain a suit in equity, against the other member or members of such firm, to have the extent of his interest in the property purchased ascertained and declared, and to recover such interest, either by having a due part of the property set over to him, or a due proportion of the proceeds of the sale of it, paid over to him, or he may recover a personal decree in the suit in a proper case for the value of such interest.— *Coggswell v. Wilson*, 31.
3. ATTACHMENT — WRIT OF — WHAT LEVIABLE UPON.— A writ of attachment or execution against an individual member of a copartnership can only be levied upon his interest in the partnership property in the same manner as levies are made upon individual property by virtue of such writs.— *Id.*
4. ID. — EFFECT OF LEVY CONSIDERED AND DETERMINED.— Where a sheriff, under a writ of attachment against an individual member of copartnership firm, made return to the writ that he had executed it by attaching all the right, title, and interest which the defendant had in and to the copartnership property of the firm; that he also took into his possession certain described personal property of such copartnership, consisting of two thousand six hundred head of sheep, more or less, and certain other animals, and that he served a copy of the writ upon the defendant, upon which copy was inclosed a notice that he had attached all the right, title, and interest of such defendant in and to the copartnership property, and transmitted another copy of the writ, with a like indorsement, to the other member of the firm: *held*, that such service and levy were only effectual

- as to the sheep and other animals which the sheriff seized and took into his possession; that it did not bind any other of the copartnership property so as to authorize a sale of it upon execution issued upon a judgment which directed that the property theretofore attached in the action be sold, as by law provided, to satisfy the plaintiff's demand therein. — *Id.*
5. **HOW IMPEADED.** — A partnership cannot be sued as such. The names of its members must be set out in the complaint and summons, and a service upon a person not named therein, although certified by the sheriff in his return to be a member of the partnership, is a nullity. — *Dunham v. Schindler*, 256.
 6. **SUIT TO DISSOLVE — PRIOR PARTNERSHIP — EVIDENCE OF — ITS EFFECT.** — In a suit by a partner to compel a copartner to account for partnership profits received by him, and the partnership has been of long standing, and was formed by written articles, the plaintiff will not be permitted to claim that prior to its formation another partnership had existed between the parties, and that the defendant retained the profits realized therefrom, and included them in the part of the capital stock which the articles of the subsequent partnership specified that he had invested therein, where said articles are silent as to any prior partnership, and as to any profit having been realized therefrom. — *Langell v. Langell*, 220.
 7. **ARTICLES OF COPARTNERSHIP — CONTEMPORANEOUS PAROL AGREEMENT.** — Where N. L. and A. L., on the twenty-seventh day of February, 1869, entered into written articles of copartnership, which specified that they had respectively invested certain amounts: *held*, that it was not competent for N. L. to prove a contemporaneous parol agreement between them, to the effect that the parties were to put into the copartnership the stock and profits of an alleged previous copartnership transaction, and that it constituted a part of the amount invested by A. L. And where the alleged previous partnership transaction of a government contract, taken in the name of J. L., the father of N. L. and A. L., who, long prior to the commencement of the suit, had died, and there was no memorandum or any date whatever showing what profits were realized therefrom beyond a mere conjecture, a court of equity will not attempt to take an account thereof. — *Id.*
 8. **PARTNER — DUTY TO ACCOUNT TO COPARTNER.** — It is the duty of a partner to account to his copartner for all funds arising from the sale of partnership property which come into his hands. And where the partner, instead of paying over to the copartner his share of such funds, invests them in other property, the latter is entitled to claim a share of the property proportionate to his interest in the partnership. But where partnership transactions are various and multiplied, and have been of long standing, and no account has been kept of them by which it can be ascertained in what property the funds have been invested, or to what extent investments thereof have been made, courts will not attempt to trace the complainant's share of the funds into other property, but adjust the matter upon the basis of the amount of funds received by the delinquent partner. — *Id.*
 9. **PARTNERSHIP ACCOUNTING — BURDEN OF PROOF.** — In a suit for a partnership accounting, where there are issues as to the existence of the

partnership and the state of its affairs and business, or the state of the accounts between the partners, the burden of proof is on the plaintiff; and if he cannot furnish sufficient evidence to enable the court to state a partnership account, his suit necessarily fails to that extent. — *Ashley v. Williams*, 441.

10. **PARTNERSHIP ACCOUNTING — FAILURE OF PROOF.** — In such case, if necessary to close up the business, the court will determine that the accounts are closed, and that neither party shall recover anything against the other on account thereof, and that the property of the firm be sold, and after paying the costs, the proceeds be divided according to the interests of the members of such firm. — *Id.*

PLEADING AND PRACTICE.

1. **PLEADING — CONSTRUCTION.** — A party's pleading is to be construed most strongly against himself, for the purpose of determining its sufficiency. — *Kohn v. Hinshaw*, 308.
2. **PLEADING — CONSTRUCTION UNDER THE CODE.** — The Civil Code of this state requires the allegations of a pleading to be liberally construed, in order to determine its effect, with a view to substantial justice between the parties. — *Jackson v. Jackson*, 110.
3. **ID. — GROUND OF DEMURRER TO.** — A pleading must contain facts sufficient to constitute a cause of action, suit, or defense, but a failure to state them with clearness and precision is not a ground of demurrer; if they are stated in such a vague and ambiguous manner that the precise nature of the charge or defense is not apparent, the remedy of the adverse party is by motion to compel the pleader to make it more definite and certain. — *Id.*
4. **ID. — PRE-EMPTION LAWS — POSSESSION — INJUNCTION.** — Where a plaintiff alleged the filing of his declaratory statement, claiming to pre-empt two subdivisions of land under the laws of the United States; that he was a legally qualified pre-emptor under said laws; that he had been in the peaceable and quiet possession thereof, complying with the requirements of said laws in doing all necessary acts of residence and cultivation; that the defendant unlawfully and wrongfully took possession of one of the subdivisions, and prevented and forcibly resisted the plaintiff from taking possession thereof; that the defendant forcibly resists plaintiff from taking possession of the land in order to do the necessary acts of residence and cultivation thereon; and that the defendant was wholly insolvent: *held*, that the facts stated were sufficient to constitute a cause of suit for an injunction to compel the defendant to desist from doing such acts, and to admit the plaintiff into the possession of the land; that the filing of the declaratory statement by the plaintiff entitled him to the possession of the land for the purpose of performing those acts required to be done by the pre-emption law; and that no other person had a right to enter the land or to interfere with the plaintiff's occupancy of it so long as his entry remained uncanceled. — *Id.*
5. **FACTS SET FORTH IN AN ANSWER WHICH, IN EFFECT, ONLY CONTROVERT THE ALLEGATIONS OF A COMPLAINT** may be properly pleaded in connection

with a direct denial of the main allegations thereof; and they may be so pleaded by way of confession and avoidance of the cause of action alleged in the complaint, although the denial be of such a character that, if true, would defeat such cause of action. In such case, however, the denial must be special or qualified. — *McDonald v. American Mortgage Co.*, 626.

6. SEPARATE DEFENSES TO A CAUSE OF ACTION ARE NOT INCONSISTENT when they all, taken together, may be true; but when the truth of some of them cannot be maintained without falsifying others, they are inconsistent. — *Id.*
7. A FURTHER ANSWER BY WAY OF CONFESSION AND AVOIDANCE OF THE MATTERS ALLEGED IN A COMPLAINT is inconsistent with a specific denial thereof; but may properly be pleaded with a special or qualified denial, such as a denial with an *absque hoc*. — *Id.*
8. WHERE AN ACTION WAS BROUGHT AGAINST the A. M. Co. of S. to recover a claim for work, labor, and services alleged to have been performed for it by a law firm, upon its retainer, and for money paid and agreed to be paid by said firm in the prosecution of its business and at its request; and said A. M. Co., in its answer, denied that it ever retained said law firm, or that said firm ever performed services, or paid out money for it, or that it ever had a contract with said firm, or that it ever promised to pay said firm for any services or money paid out; and for a further answer alleged, in substance, that the services rendered and money expended by said law firm, sought to be recovered in the action, were so rendered and expended for and at the instance and request of a third party under and by virtue of a contract entered into by and between the A. M. Co. and such third party, whereby said third party had agreed, for a certain consideration, to perform the said services and pay the said money, and at its own charge and expense to pay all expenses connected therewith of every nature and description, and to hold the said A. M. Co. harmless against the same; and that the terms of said contract were well known to said law firm when engaged by said third party to perform said services and expend said money: *held*, that the facts contained in such further answer were not sham, frivolous, or irrelevant, nor inconsistent with the said denial. *Held also*, that a further answer or defense interposed by the said A. M. Co., in the said action, wherein it charged and alleged that said law firm was guilty of gross negligence in the performance of said services, occasioning it great damage, was properly united as a ground of defense with said denial. — *Id.*
9. MOTION TO STRIKE OUT — ASSIGNMENTS OF ERROR — EVIDENCE — Where a separate defense was stricken out in the court below, and the notice of appeal fails to assign such action of the court as error, such ruling will not be reviewed on appeal, although the appellant offered evidence tending to sustain such separate defense, and excepted when the same was excluded, and assigned said last-named ruling as error in his notice of appeal. — *Bewley v. Graves*, 274.
10. SEPARATE DEFENSE — EVIDENCE. — After a separate defense has been stricken out, it is not error in the court below to exclude all evidence tending to support the same. If the court erroneously struck out a

proper defense, the party injured must secure a reversal of such ruling before he can complain that his evidence was improperly excluded. — *Id.*

11. **PLEADINGS — ERRONEOUS RULING UPON.** — An alleged error in the court below upon a question of pleading cannot be reviewed or corrected on an assignment of error as to the exclusion of evidence. — *Id.*
12. **MOTION FOR NONSUIT — BILL OF EXCEPTIONS — EVIDENCE.** — Unless the bill of exceptions shows upon its face that all the evidence before the jury at the time the motion for a nonsuit was made is included therein, this court will not review the action of the court below in overruling such motion. — *Roberts v. Parrish*, 583.
13. **INSTRUCTIONS NOT WARRANTED BY FACTS.** — However correct instructions may be as abstract propositions of law, if they are inapplicable to the facts in evidence in the particular case, they are properly refused. — *Id.*

See **APPEALS; COUNTIES; DEPOSITIONS; ELECTIONS; INFANCY; JURISDICTION; MALICIOUS PROSECUTION, 2; PARTNERSHIP; REFEREES; REPLEVIN; SHERIFFS; SLANDER; TRUSTS, 4, 5.**

PROCESS.

1. **A GENERAL APPEARANCE** waives all questions as to the service of a process, and is equivalent to a personal service. — *Kinkade v. Myers*, 470.
2. **A SPECIAL APPEARANCE**, designating the particular purpose for which the party appears, limits the appearance to that particular matter. — *Id.*
3. **WHERE THE SERVICE OF A SUMMONS IS ILLEGAL** and fatally defective, a defendant may appear therein specially for the purpose of having such service set aside, and there is nothing in the Oregon code restrictive of such rights. — *Id.*
4. **WHAT IS — SERVICE ON LEGAL HOLIDAY, EFFECT OF.** — Service of process upon a legal holiday is irregular, and may be pleaded in abatement, or set aside on motion, but a notice of contest, like a summons, is not technically "process," but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is required to answer it within a specified time. — *Whitney v. Blackburn*, 564.

PROMISSORY NOTES.

See **NEGOTIABLE INSTRUMENTS.**

RAILROADS.

1. **RAILROAD COMPANIES — INJURIES AT CROSSING — CONTRIBUTORY NEGLIGENCE.** — Plaintiff attempted to pass a railroad crossing with a team and wagon. She had just observed the passenger train pass, and was not expecting any other train at that time, although she had seen a freight train standing on the track, headed that way, in the town which she had just left. The railroad at that point cuts through a hill, so as to obstruct the view from the wagon-road. She was familiar with the crossing, having crossed there many times before, and had always used great care in looking for trains. On this occasion she did not stop to look or listen; her

team came into collision with a passing engine, and one horse was killed and the wagon was overturned. *Held*, that plaintiff was guilty of contributory negligence. — *Durbin v. Oregon R. R. Co.*, 5.

2. THE ACT OF 1887, FOUND IN THE CODE OF MISCELLANEOUS LAWS, from and including section 4044 to and including section 4049, which provides, in effect, that a railroad company owning or operating a railroad in this state shall be liable for the value of stock killed, and for reasonable damages for stock injured upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; that in every such action for the recovery of such value for stock so killed, or for damages for such injury for the same, proof of the killing or injury shall of itself be deemed and held to be conclusive evidence of negligence upon the part of the company; that contributory negligence on the part of the plaintiff in such action may be set up as a defense; but that the allowing of stock to run at large upon common unfenced range, or upon inclosed land owned or in the possession of the owner of such stock, shall not be deemed or held to be such contributory negligence, — entitles an owner of stock to recover against a railroad company for such killing or injury of the same, by alleging and proving that the company owned or operated the railroad, that its track was unfenced, and that the killing or injury was done on or near the track, by a moving train, engine, or cars upon such track; and it is not necessary, in an action in such a case, for the plaintiff to allege negligence on the part of the company in any form. Fencing the railroad track is not imposed upon the company as a duty, but the track being unfenced is a fact which of itself establishes conclusively that the company was guilty of negligence; and the only defense the company has is to plead contributory negligence upon the part of the plaintiff, or of willful intent on his part to procure the killing or injury to be done. Said act does not, however, relieve the owner from the duty of keeping his stock within reasonable confines. He owes a duty to the public, which requires him to use reasonable efforts to prevent it from going where it will imperil the safety and security of persons and property; and while he is allowed to depasture his horses and cattle upon "the common unfenced range" without being chargeable with contributory negligence in case they are killed or injured as mentioned, yet he is not permitted to turn them out to roam wherever their instincts incline them. — *Hindman v. Oregon Ry & N. Co.*, 614.
3. WHERE H., THEREFORE, BROUGHT AN ACTION against the Oregon Railway and Navigation Company, a railroad corporation, for the recovery of the value of a certain bull, which he alleged was killed upon the railroad track of the latter by being run against and over by the company's train of cars at a place where the track was unfenced, and the company filed an answer to the effect that H. knowingly allowed the bull to range at large outside of his inclosure and upon the railroad track; that the bull was so at large in violation of section 3393 of the laws of Oregon; that the animal was there struck and killed by the company's locomotive, and that the killing was the result of the wrongful and unlawful act of H. in so allowing it to so range at large outside of the inclosure of H.: *held*, that it constituted a good defense, whether the bull was at large in violation of said

section 3393 of the laws of Oregon or not, that the facts set forth in the answer showed contributory negligence on the part of H., and that the sustaining of the demurrer thereto by the lower court was error. — *Id.*

4. COMMISSIONERS — BOARD OF — LEGISLATIVE POWERS OF. — A power conferred by the legislature upon a board of commissioners required to be exercised with reference to the affairs of certain corporations will not be extended by implication, and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it, where the legislative assembly of the state passed an act creating a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business within the state, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights or what change in the rate of freight or fares are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable. — *R. R. Comm'rs v. Oregon etc. Co.*, 63.
5. *Id.* — *Therefore held*, that the board had no jurisdiction to require a railroad company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment. — *Id.*
6. *Id.* — *Held further*, that where such act directed the board to examine into such affairs, and specially required it to report the result of its investigation concerning specific matters to the legislature, evidently for the purpose of its action thereon, it would not be presumed that the act intended to give the board authority to adjust those matters, although it was empowered by certain provisions therein contained to hear complaints made by persons against railroad companies on account of acts in general done or omitted to be done by them. — *Id.*
7. *Id.* — *And held further*, that a provision in the act, to the effect that whenever any railroad company violated, refused, or neglected to obey any lawful order or requirement of the board, to enter complaint in the circuit court of the state, sitting in equity, and that such court should have power, upon notice to the company, to proceed to hear and determine the matter speedily, etc., did not authorize such a proceeding in order to enforce the repayment of money charged on freight claimed to be in excess of a reasonable charge; that a claim of that character can only be enforced by a common-law action. — *Id.*

REFEREES.

1. UNDER THE PROVISIONS OF THE OREGON CODE, the court may direct a reference without the consent of the parties, or of its own motion, where the trial of an issue of fact requires the examination of a long account on either side. Where, therefore, the plaintiff's claim consisted of about 180 items in number, which varied in amount from fifty cents to \$550, as shown by a bill of particulars furnished by the plaintiff: *held*, that the case was a proper one for the court to direct a reference. The decision in *Tribou v. Strawbridge*, 7 Or. 156, approved. — *McDonald v. Am. Mortgage Co.*, 626.

2. PRACTICE — LONG AND COMPLICATED ACCOUNTS. — Where it becomes necessary to examine long and complicated accounts, an order of reference, in addition to directing the referee to take the evidence, ought also to direct him to find the facts and state the effect between the parties. — *Bigne v. David*, 362.

REMAINDERS.

See WILLS, 4-6.

REPLEVIN.

1. VERDICT. — In an action of replevin, when the issues are the ownership, right to the possession and value of the property, and the wrongful taking by the defendant, a verdict which simply finds for the plaintiff in the sum of \$512 will not authorize a judgment in his favor. — *Smith v. Smith*, 444.
2. PLEADING — DEMURRER — REPLEVIN. — When a defendant wishes to challenge the authority of a court to try an action in replevin in the county in which such action is brought, unless it was alleged in the complaint that the property was taken in such county, he should distinctly specify that objection in his demurrer, and thereby call the attention of the court to the point he asked to have decided. — *Marx v. Croisan*, 393.
3. WHEN A DEFENDANT DEMURS TO A COMPLAINT on the ground that the facts stated do not constitute a cause of action, and the court overrules such demurrer, and the defendant refuses to further plead, and the court renders judgment against him, he waives the right to urge thereafter such dilatory matter as an omission to allege the county or venue in the complaint in replevin. Nor does the objection specified in the demurrer apply to defects of a dilatory nature, but is limited to the subject-matter proper of the action. — *Id.*
4. WHEN IN A COMPLAINT IN REPLEVIN the goods were alleged to have been taken in a certain store in the city of Salem, without stating the county or state, the court will take judicial notice that the city of Salem is the county seat of Marion County, and the capital of Oregon, and is located within said county and state. — *Id.*
5. VERDICT — HILL'S CODE, SECTION 214. — In an action of replevin, if the verdict contains all that is required by this section, it must be held to be sufficient. — *Corbell v. Childers*, 528.
6. JURISDICTION OF THE COURT — ANSWER. — The plaintiff's complaint, in an action of replevin commenced in the county court, alleged that the value of the property demanded was \$365, and the defendant's answer alleged its value to be \$1,060: *held*, that the court had jurisdiction of the subject of the action, which was not defeated or ousted by the answer, and that the question of jurisdiction could be summarily determined on motion. — *Id.*

RES ADJUDICATA.

1. FORMER ADJUDICATION — ESTOPPEL. — Where a fact has been once litigated in a court of competent jurisdiction, the judgment rendered therein forever estops the parties and their privies from again litigating the same fact. — *Hall v. Zeller*, 381.

2. **ITS EFFECT.** — Where some specific fact or question has been adjudicated or determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. — *Id.*

See **STARE DECISIS.**

RIPARIAN RIGHTS.

See **WATERS.**

ROADS.

See **HIGHWAYS.**

SALES.

GOOD FAITH — PURCHASER OF CHATTEL — CAVEAT EMTOR. — Good faith will not protect the purchaser of a chattel from one without title. In such case, *caveat emptor* is the rule. — *Church v. Melville*, 413.

SCHOOLS.

TEACHER — CONTRACT FOR COMPENSATION OF — SCHOOL — SUSPENSION OF — FOR WHAT REASON MAY BE DONE. — Where under a contract between the directors of a school district there was a clause to teach a definite period unless the school was discontinued by order of the directors, and the directors in consequence of the prevalence of diphtheria, stopped the schools, but reopened them when the danger had passed, and before the expiration of such contract: *held*, that the discontinuance of the school was for good cause, and authorized under the contract, but that it did not operate to annul such contract and discharge the teacher, but that it did relieve the district from liability during such period, but not from liability for the unexpired portion of such contract after the schools were reopened. — *Goodyear v. School District No. 5*, 517.

SEDUCTION.

1. **PREVIOUS UNCHASTITY — REFORMATION.** — A woman may be unchaste, and then reform and lead a virtuous life, and if she is then seduced, her seduction ought to be visited with such damages as a jury would think, under all the circumstances, the defendant ought to pay; but to justify a recovery there must be a reformation. — *Patterson v. Hayden*, 238.
2. **DEFINED.** — The word "seduction," when applied to the conduct of a man toward a woman, means the use of some influence, artifice, promise, or means on his part, by which he induces the woman to surrender her *chastity and virtue* to his embraces: *therefore, held*, that criminal indulgence with a woman who was at the time leading a lewd and lascivious life does not constitute seduction. — *Id.*

SHERIFFS.

NEGLECT — ACTION — PLEADING. — In an action against a sheriff for a neglect of an official duty, the complaint must allege the particular neglect or omission upon which the plaintiff relies. — *Kota v. Hinshaw*, 308.

See **EXECUTIONS.**

SLANDER.

1. **SPECIAL DAMAGE — ACTIONABLE WORDS.** — At common law, there was no redress for defamatory words, unless they imputed a crime, or related to a man's profession or trade, or caused some special damage. — *Davis v. Stadden*, 259.
2. **SPECIAL DAMAGES — WHEN MUST BE ALLEGED AND PROVEN.** — Words spoken of a female charging her with adultery or fornication or incontinence in any form were not actionable unless special damage ensued, which were required to be alleged and proved. — *Id.*
3. **ACTION FOR AT COMMON LAW.** — Defamation was a subject of spiritual censures, the remedy for common bad language being in the ecclesiastical courts; and the fact that it was so explains the reason of the rule as it exists at common law. — *Id.*
4. **ECCLESIASTICAL COURTS — JURISDICTION OF.** — Adultery being a spiritual offense, cognizable only in the ecclesiastical courts, and the punishment being confined to the infliction of penance *pro salute animæ*, it resulted, to avoid punishing a party twice for the same words, that to charge a married woman with adultery was not actionable *per se*, and that no redress could be obtained therefor at common law, without special damage is shown. — *Id.*
5. **STATUTE LAW — EFFECT OF IN ACTIONS FOR SLANDER.** — And this is the rule applied to the several states in which the common law prevails, where such offenses as adultery and fornication have not been made indictable by statute. — *Id.*
6. **WORDS ACTIONABLE PER SE.** — Words, then, are actionable in themselves only where an offense is imputed by them for which the party is liable to indictment and punishment, either at common law or by the statute. — *Id.*
7. **IMPUTING ADULTERY TO MARRIED WOMAN.** — To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery, and as under our criminal code adultery is indictable and punishable, such words charge a crime, and are actionable *per se*. — *Id.*
8. **REPETITION — JUSTIFICATION.** — Slanderous words cannot be justified by proof that the defendant only repeated what he heard another person say concerning the plaintiff. (On rehearing.) — *Id.*

SPECIFIC PERFORMANCE.

1. **PAROL LEASE FOR TERM EXCEEDING ONE YEAR.** — Under section 785, subdivision 6, Hill's Code, an agreement for the leasing of land for a longer period than one year is void, unless the same or some note or memorandum expressing the consideration be in writing, and subscribed by the party to be charged, or his lawfully authorized agent. — *Wallace v. Scroggins*, 476.

2. **PAROL AGREEMENT — PART PERFORMANCE.** — But where such parol agreement was made, and the same has been partly performed, it is taken out of the operation of the statute of frauds, and a court of equity has power to specifically enforce the same. — *Id.*
3. **WHEN THE PLAINTIFF PARTLY PERFORMED A PAROL AGREEMENT** for a lease for more than one year, incurred expenses, and changed her circumstances and condition to such an extent that a refusal on the part of the defendant to perform such parol agreement would operate as a fraud on the plaintiff, such agreement will be specifically enforced in equity. — *Id.*
4. **LEASE FOR MORE THAN ONE YEAR.** — An agreement for a lease for more than one year is an agreement for an "estate or interest in real property," and in a proper case may be specifically enforced in equity, on the same terms and under the like circumstances that any agreement concerning land is or may be specifically enforced. — *Id.*
5. **CONTRACT — SPECIFIC PERFORMANCE OF MARRIAGE SETTLEMENT.** — A court of equity will not decree a specific performance of an oral agreement to make a marriage settlement, unless the party to be charged has given countenance to the doing of acts by the adverse party, upon the faith of the agreement, of such a nature that the latter would be materially injured if the agreement were not carried out. In such a case, the court, in order to avoid a fraudulent use being made of the statute, will enforce a specific performance of the agreement. — *Adams v. Adams*, 248.

See COSTS.

STARE DECISIS.

LAW OF THE CASE — SECOND APPEAL. — The decision of this court becomes the law of the case; and upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart. — *Applegate v. Dowell*, 299.

STATUTES.

1. **WHEN SAME TAKES EFFECT — EMERGENCY.** — An act which passes both houses of the legislature, and which contains an emergency clause followed by the words, that the same "shall take effect and be in force from and after its approval by the governor," but which the governor never approves, but vetoes, and the same is then duly passed by both houses by the necessary majorities notwithstanding the veto, takes effect and is in force from and after its passage. — *Biggs v. McBride*, 640.
2. **EMERGENCY CLAUSE — VETO — WHEN TAKES EFFECT.** — Such act takes effect when the law-making power has done every act or thing necessary under the constitution to its complete enactment as a law. — *Id.*
3. **CONSTITUTIONAL LAW — EMERGENCY — POWER OF THE LEGISLATURE.** — The constitution has vested in the legislature the power to declare in the body or preamble of an act the emergencies by which it may be put in force in less than ninety days after the adjournment of the session; and when the emergency is specified in the act, the same is conclusive upon the courts, and is not reviewable. — *Id.*
4. **STATUTORY CONSTRUCTION — "MAY"** — When the word "may" is used in a statute in conferring power upon a court officer or tribunal, and the

public or a third person has an interest in the execution of the power, the exercise of the power becomes imperative. — *Kohn v. Hinshaw*, 308.

See ATTACHMENT AND GARNISHMENT, 1; CONSTITUTIONAL LAW, 2; ELECTIONS, 2.

STATUTE OF FRAUDS.

1. AGREEMENT TO ANSWER FOR ANOTHER'S DEBT, WHEN NEW AND ORIGINAL, AND WHEN COLLATERAL. — S. was indebted to M. in the sum of one hundred and sixty dollars, to be paid in rails at fifty dollars per thousand, to secure the performance of which agreement S. had pledged certain property to M. If the defendant agreed with the plaintiff to pay him the one hundred and sixty dollars which S. owed him, and that in consideration of such agreement the plaintiff discharged S. from all liability for said debt, and released the property which he held in pledge for its payment, the defendant's agreement to pay the one hundred and sixty dollars to M. is a new and original agreement, and is not within the statute of frauds. *Aliter*, it is within the statute, and void. — *Müller v. Lynch*, 61.
2. VERBAL PROMISE. — A verbal promise to pay the debt of another if the creditor will forbear to sue or discontinue a suit already begun, or release a lien on personal property held in pledge, unless the promisor derives a benefit therefrom peculiar to himself, are all collateral undertakings, and within the statute, unless in writing. — *Id.*
3. MARRIAGE CONTRACT—INDUCEMENTS TO MAKE REPRESENTATIONS CONCERNING PROPERTY. — Where W. A., in proposing marriage with L. A., held out inducements that he was able to support her; that he expected to keep control of certain premises owned by him during his lifetime, and have them for a home, and that she should share them with him; and in case she survived him, should have the use and control of them during her lifetime, and after their marriage the parties occupied the premises as a home, the said W. A. assuring the said L. A. that it was their home: *held*, that the facts did not prove an agreement upon the part of W. A. to give to L. A. the use of the property for her home during her life, in consideration of her marrying W. A.; that such an agreement, if not in writing in some form, would be void by the statute of frauds, and that the said facts did not show a sufficient partial performance of the agreement to take it out of the operation of the statute. — *Adams v. Adams*, 248.
4. AGREEMENT — PART PERFORMANCE OF — WHAT IS. — The marriage alone of parties is not such a partial performance of an agreement made between them regarding pecuniary rights as will be sufficient to take it out of the operation of the statute, which requires such agreements to be in writing. — *Id.*
5. LEASE TO COMMENCE IN FUTURO—STATUTE OF FRAUDS. — A lease of land for a year, to commence *in futuro*, is "an agreement not to be performed within a year," within the meaning of the statute of frauds, and must be in writing; otherwise it is invalid. — *White v. Holland*, 3.

See SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS.

1. **QUITCLAIM DEED—COLOR OF TITLE.** — Color of title is that which in appearance is title, but which in reality is no title. A claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitations, other requisites of those statutes being complied with. — *Swift v. Mulkey*, 532.
2. **CAUSE OF ACTION—WHEN IT ACCRUED.** — When R. became surety for M. on a promissory note, and paid the same when it became due, R.'s cause of action accrued to him at the time of the payment: *therefore, held*, that before such payment in another state where all the parties resided M. removed to the state of Oregon, the plaintiff's cause of action is not saved to him by the first clause of section 16, Hill's Code, for the reason that when the action accrued the defendant was not "out of the state." — *Roton v. Mendenhall*, 199.
3. **SECTION 16, HILL'S CODE—CONCEALMENT OF DEFENDANT—CASE IN JUDGMENT.** — The plaintiff signed the defendant's promissory note in Tennessee on the tenth day of February, 1869, and the defendant soon thereafter clandestinely left the state of Tennessee and never returned, and the plaintiff made diligent inquiry of his neighbors and others to find the whereabouts of the defendant, and the plaintiff did not know the whereabouts of the defendant until six months before the commencement of this action: *held*, this does not show that the defendant was concealed within the meaning of section 16, *supra*. — *Id.*
4. **CONCEAL—MEANING OF.** — The word "conceal," as used in our statute of limitations, means some affirmative act done in this state, such as passing under an assumed name, change of occupation, or any acts by the defendant which tend to prevent the community in which he lives from knowing who he is or whence he came. — *Id.*

See *WATERS*, 2.

SUMMONS.

See *PROCESS*.

TAXATION.

1. **VALIDITY.—CONCLUSIVENESS OF TAX DEED.** — In an action to determine the title to certain realty claimed under a tax deed, evidence tending to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum, was excluded: *held*, error, even under a statute making a tax deed evidence of the regularity of an assessment. — *Strode v. Washer*, 50.
2. **CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS.** — Miscellaneous Laws of Oregon, chapter 57, section 90, which provides that a tax deed shall be conclusive evidence of the regularity of the levy, assess-

ment, collection of taxes, and sale of the property, was amended in 1887 so as to destroy the conclusive effect of the tax deed in these several proceedings: *held*, this amendment does not impair the obligation of contracts as to purchases made prior to the amendment, but simply changes the rule of evidence. — *Id.*

TEACHERS.

See SCHOOLS.

TORTS.

See INJUNCTIONS.

TRANSCRIPT.

See APPEALS.

TRESPASS.

See EQUITY; INJUNCTIONS.

TRUSTS.

1. IN A SUIT TO ESTABLISH BY PAROL EVIDENCE A RESULTING TRUST IN REAL PROPERTY, upon the alleged grounds that it was purchased and the conveyance of the legal title taken in the name of one person, while the purchase price was paid by another, the evidence of the payment of the purchase price, or of the exact portion of it which was paid, where payment of a part only is claimed, in order to be effective, must be clear, certain, and convincing. And it is indispensable to the establishment of such a trust that the payment should be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him, as a part of the original transaction of purchase, at or before the time of the conveyance. — *Sisemore v. Pelton*, 546.
2. IN ORDER TO ESTABLISH A CONSTRUCTIVE TRUST IN REAL PROPERTY, upon the grounds that the conveyance of the legal title was taken by one possessing some fiduciary character, or standing in some fiduciary relation, it must be shown by clear and unmistakable evidence that the purchase was made with trust funds. — *Id.*
3. WHERE S. AND P. WERE PARTNERS IN BUSINESS, and the latter purchased from I. a certain tract of land by taking an assignment from I. of a certificate of purchase thereof from the state, which I. had received upon his purchase of the land as school land; and upon which purchase he paid one installment and executed his three several promissory notes in payment of the other installments, which, by an understanding with P., had with him at the time of the assignment of the certificate of purchase, I. was to pay off, but neglected the payment of two of them, and S. subsequently, and long after the death of P., paid them, with the accrued interest thereon,

and had the deed to the land executed by the state to P.: *held*, that the fact of such payment by S. did not give a resulting trust in his favor; *held further*, that as there was no evidence showing that P., in his purchase of the land from I., paid for it with the partnership funds, S. could not claim that a constructive trust arose, or was created in his favor. — *Id.*

4. A TRUST MUST BE PLEADED IN ORDER TO BE AVAILABLE. — In order to unite a claim to recover back an estate, or to have a trust therein declared, with a claim for an accounting, it must be pleaded as a separate cause of suit. Nor will the plaintiff be entitled to such character of relief where he has conveyed the estate by voluntary deed, unless it was procured to be made by fraud, or unless subsequent circumstances of such a nature have arisen as would render the retention of the property by the grantee unconscionable and fraudulent. — *Langell v. Langell*, 220.
5. PLEADING — SUFFICIENCY OF. — Where the plaintiff alleged in his complaint that, for the purpose of enabling the defendant to sell certain described lands, in which he (plaintiff) had an undivided half-interest, he gave the defendant a deed to his interest therein, and for no other purpose or consideration: *held*, that the allegation was not sufficient to entitle him to a reconveyance; that his remedy in such a case would be upon the obligation of the defendant to sell the land and account for the proceeds; and that a promise to do so, and a refusal to comply therewith, would be material allegations in order to establish the liability. — *Id.*

See DEEDS, 8; UNINCORPORATED SOCIETIES.

UNDERTAKINGS.

See APPEALS, 2, 3; ATTACHMENT AND GARNISHMENT; BAIL.

UNINCORPORATED SOCIETIES.

1. UNINCORPORATED ASSOCIATION — RIGHT OF ONE TO SUE FOR ALL. — One or more of the members of an unincorporated association may sue for the benefit of the whole, to enforce a right in favor of the association which is cognizable in equity, where the members comprising it are so numerous that it would be impracticable to bring them all before the court. — *Liggett v. Ladd*, 89.
2. RELIGIOUS DOCTRINE — RIGHT TO TEACH INCLUDES RIGHT TO ACQUIRE PROPERTY. — The right to believe and teach religious doctrines includes the right to organize churches, establish seminaries of learning, and acquire property for that purpose, and to claim the protection of the civil law in the enjoyment of such right. — *Id.*
3. TRUSTEE — MAY HOLD PROPERTY FOR VOLUNTARY ASSOCIATION — CORPORATION AS TRUSTEE. — Mere voluntary associations are incapable of taking and holding real property in their society name; but it may be held for their use and benefit through the intervention of a trustee, who may be a natural or artificial person. When, therefore, an incorporated religious association procured through other parties the formation of a corporation for literary purposes, the charter of which contained a provision that its object was to acquire and hold property in trust for such associa-

tion, and that its trustees should be appointed by the representatives of the latter: *held*, that property subsequently conveyed to it, unless the deed of conveyance limited it to a different use, must be deemed to have been taken in trust for the association; and where the legislature in providing for a college, the leading object of which should be to teach such branches of learning as are related to agriculture and the mechanic arts, in compliance with the provisions of the act of Congress granting public lands to the several states and territories which might provide colleges for that purpose, passed July 2, 1862, designated and adopted the said corporation as the Agricultural College of the state, in which all students should be instructed in accordance with the requirements of said act of Congress, and the corporation accepted such designation and adoption in pursuance of a requirement of the legislature: *held*, that the relations of the corporation to the religious association were not thereby changed; that the state, in consequence of such act and acceptance, was not authorized to alter the charter of the corporation, or interfere with the right of the association to manage property conveyed to the former, as provided in the charter; nor that the designation of the corporation as such college created a new entity, or changed its character as trustee of the property held by it for the benefit of the association. *Held, further*, that a deed to land subsequently executed to the corporation, which contained a provision to the effect that the premises be used by it for the purposes of the Agricultural College of the state, and that when they should cease to be so used, they should vest and become the property of the persons who had or should contribute the purchase-money, did not impress a trust upon the premises in favor of such college; that the latter, as distinct from the corporation, was only ideal; that said provision in the deed referred to created a conditional limitation in favor of the persons who contributed the purchase-money, and that the trustees of the corporation could not rightfully convey the land contrary to the will of the association. — *Id.*

VENUE.

See JURISDICTION, 6.

VERDICT.

VERDICT. — In an action where there are numerous issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every question of fact at issue. — *Hall v. Zeller*, 381.

See REPLEVIN, 1.

VOTERS.

See ELECTIONS.

WATERS.

1. AN OWNER OF LAND BOUNDED BY NAVIGABLE WATERS possesses important riparian rights. By virtue of such ownership, he is entitled to build

wharves out to such a depth of water as will enable ships and vessels navigating it to touch at such wharves and receive and discharge freight, and has the right to use the shore in front of his land for any purpose not inconsistent with the rights of the public. He may reserve such right to himself when he conveys away the land above high-water mark to which it pertains, or grant it to others to enjoy. Such right, however, is a mere incorporeal hereditament, and the possession of it cannot be recovered from a usurper by an action in the nature of an ejectment. Where S., therefore, who owned a donation land claim, bounded by high-water mark, on the tide-waters of the Columbia River, laid off a block in front of his claim extending beyond low-water mark, and sold lots therein to the defendant, but reserved in the deed of conveyance all the hereditaments, franchises, and wharfing privileges, fronting on the north of the northern boundary line thereof, which hereditaments, appurtenances, etc., he subsequently granted to the plaintiff, and the defendant, disregarding said reservation, built and erected structures in the navigable waters of the river in front of the northern boundary line of the lots purchased: *held*, that the plaintiff had no such tangible interest in the land and water where the structures were situated as would enable him to recover it in an action for the recovery of the possession of real property. — *Parker v. West Coast P. Co.*, 510.

2. ADVERSE POSSESSION MUST BE HOSTILE TO OTHER USE. — An adverse, exclusive, and uninterrupted use and enjoyment by one person, and those under whom he claims, of all the water of a creek taken therefrom by means of a ditch, and conveyed to certain mining grounds for mining purposes, for twelve years, or for any period beyond that of the statute of limitations prescribing the time in which entry shall be made upon real property, will bar the owner of the land through which the creek runs of his riparian rights; but where the ditch was constructed, by means of which the water was originally appropriated, under a license granted by the owner of the land, in which he reserved the right to use the water a part of each year for his own purposes, such adverse use by grantees from the original appropriator cannot be established, unless it is shown that the use of the water by them has been in hostility to the use of it by the owner of the land under such reservation. — *Huston v. Bybee*, 140.
3. *Id.* — The users of the water, in such case, must show that their use of it was in defiance of any right upon the part of the owner to use it for any purpose; that they totally ignored his right to use it at all, and that he acquiesced therein. — *Id.*
4. RUNNING WATER — USE OF FOR IRRIGATING LAND, ETC. — AFTER USE — CONTRACT CONSTRUED. — Where a certain stream of water ran across the land of B. which he was accustomed to use for the purposes of irrigation, for watering his stock, and for domestic use, and which was valuable and necessary for such uses, and he was applied to by one S. for permission to dig a ditch across his land, in order to conduct the water of the stream to certain mining grounds below, upon which S. was engaged in mining, and B. granted the permission upon the promise of S. that the former should have the exclusive use of the water flowing through the ditch at

- any point on said lands where he might desire to turn it for irrigating purposes during the spring and summer months, and that S. would not sell or dispose of the ditch and water right to any one else, but that they would revert and become the property of B.: *Held*, that by a fair construction of the arrangement between B. and S., in view of the circumstances of the transaction, the former was to have the use of the water whenever required, for the use of his premises for the purposes mentioned, and the latter was to have the use of it at all other times for the purpose of working his mining ground. — *Id.*
5. *Id.* — *Held*, further, that S. having subsequently sold his mining ground and interest in the ditch, and H. having, by means conveyances from S., succeeded to the same, and he and his grantors having used the water conveyed through said ditch for the purpose of operating in the said mining ground with the knowledge and acquiescence of B., that the latter was not entitled to claim a forfeiture of the said ditch and water right on account of the said sale by S.; that B.'s acquiescence in the sales and transfers of the ditch and water right must be deemed a waiver of the condition that S. would not sell them. — *Id.*
 6. *Id.* — *Held*, also, that the use by H. and his grantors of the ditch and water to operate the mine, although it extended beyond the period of the statute of limitations, would not constitute such an adverse possession against B. as would bar his right to the use of the water, under the reservation in the license to S. to construct the ditch, unless H. and his grantors had wholly excluded B. from the exercise of such right during such period; and that evidence of B. having used the ditch and water a portion of each year during the whole time referred to, for irrigating his land, and for the other purposes mentioned, disproved any such exclusive use thereof as suggested, or any use inconsistent with said license and reservation. — *Id.*
 7. *Id.* — *Held*, too, that B. and H., and those holding under H., had coexisting rights in the ditch and water; that B. had the preference during the season when the condition of his premises were such as to require the use of the water for the purposes mentioned, but that he had no right to waste it at any time, or to use it extravagantly or imprudently; that H. had the full and free right to use it at all other times, and that each was required to respect the rights and interests of the other regarding the matter, in every particular. — *Id.*
 8. **NAVIGABLE STREAM — WHAT IS.** — The doctrine that a stream of water is navigable if of sufficient extent and capacity to float logs and timber from mountainous regions to market, and may thereby be utilized for the benefit and advantage of the community at large, cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs and timber a short distance. — *Haines v. Hall*, 165.
 9. **NAVIGABLE STREAM.** — A stream which has floating capacity at certain periods, recurring with regularity, and continuing a sufficient length of time to make it useful as a highway for floating logs, is navigable; but, to

be navigable in this sense, it must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce. (LORD, J., concurring.)—*Id.*

10. **NAVIGABLE STREAM.** — Where the facts show that a stream is not navigable for floating logs without doing irreparable injury to the estate through which it flows, and the defendant claims a right to use such stream for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat the numerous trespasses which the exercise of such right necessarily involves: *held*, that the plaintiff was entitled to an injunction to prevent irreparable injury and to avoid a multiplicity of suits. (*Id.*)—*Id.*
11. **NAVIGABLE STREAM—CASE IN JUDGMENT.** — Where a small stream of water only about twenty feet in width where confined within its banks, and about thirty-five in other places, ran across the farm of W. F. H. and emptied into another stream two miles below, which during four or five weeks in the year increased in volume, by the melting of snows in its vicinity, sufficiently to enable T. H. to float logs down it by stationing a large number of men along its banks "to break jams," by arranging logs along the stream so as to confine the water in a narrower channel at points where the banks were not sufficient to prevent its spreading out, and by constructing reservoirs above and opening them so as to make a greater flow in a given length of time: *held*, that the stream was not navigable in the sense which made it a public easement. And where it appeared that the attempted use by T. H. of the stream as mentioned resulted in destroying its banks, extending it in width, in diverting its waters from the channel, and causing them to overflow the land of W. F. H., which was in cultivation, and wash off the soil of a material part of his lands, and that T. H. claimed the right, and threatened to continue such practice, and it further appearing that W. F. H. had already sued a former party in an action at law for attempting to exercise a similar right, and had recovered the sum of fifty dollars as damages on account thereof: *held further*, that equity should interfere and prevent T. H. from carrying his threats into execution.—*Id.*
12. **STREAM—TEST AS TO ITS NAVIGABILITY.** — A stream which has sufficient capacity during seasons of high water continuing for a sufficient length of time to enable a person to float some logs to market, or to a place where they may be manufactured into lumber, is subject to the public easement as a passage-way for such logs. To the extent that it is useful for that purpose, it must be deemed navigable. (STRAHAN, J., dissenting.)—*Id.*
13. **ID.—CAPACITY—TEST OF.** — The actual capacity and utility of a stream for the purpose of commerce, or the floating of logs or other commodities to market, is the test of the public right of passage. (*Id.*)—*Id.*
14. **PUBLIC RIGHT—LIMITED TO STREAM.** — The public right is confined to the stream and measured by its extent, and does not extend to the shore. (*Id.*)—*Id.*
15. **DRIVING OF LOGS—USE OF SHORE.** — The right to float logs on a stream does not include the right to occupy the shore for the purpose of aiding in

driving them, or of dislodging those which have become jammed. (Id.) — *Id.*

16. **USE OF SHORE.** — One floating his property down a stream has no right, without a license from the riparian owner, to use the banks of the stream to aid him. (Id.) — *Id.*
17. **RIGHT TO MAINTAIN DAM — EFFECT OF DEEDS.** — The effect of the deeds offered in evidence was to vest in the defendants the right to keep and maintain a dam ten feet high above low-water mark at the place described, on Johnson's Creek, in Multnomah County. — *Wright v. Shindler*, 404.
18. **CASE ADJUDGED.** — An examination of the evidence leads to the conclusion that the present dam, maintained by the defendants on Johnson's Creek, is of the same height as a former dam; that the defendants and those under whom they claim had not destroyed or changed the landmarks, and that the maintenance of the dam by defendants is not wrongful, and that plaintiff's land is subject to whatever flowage a dam ten feet high at low-water mark at the point described may produce or cause. — *Id.*

WHARVES.

See **WATERS**, 1.

WILLS.

1. **A WILL IS DECLARED TO BE THE LEGAL DECLARATION** of a man's intention which he wills to be performed after his death. — *Jasper v. Jasper*, 590.
2. **IN CONSTRUING WILLS, THE RULE IS, THAT THE INTENTION MUST GOVERN**, provided it be consistent with law; but in ascertaining what the intention is, the words used are to be taken according to their meaning, as gathered from the consideration of the whole instrument and a comparison of its various parts; and this is often aided by extrinsic circumstances surrounding its execution, in revealing more clearly the motive or intention which may be reasonably supposed to have influenced the testator in the disposition of his property. — *Id.*
3. **WHERE A WILL PROVIDED THAT, AFTER THE PAYMENT OF THE DEBTS AND LEGACIES SPECIFIED, the residue of all the testator's property was to be held in trust for a certain period, and out of the rents and profits to be collected therefrom the executors were to pay to the widow such sum or sums as may be necessary to the support of such widow and the support and education of the minor children, and the county court, before such debts were paid, and while the estate was still unsettled, ordered the executors to pay a certain sum for such support and maintenance: held, that as under the will the executors were not to pay such sum or sums for that purpose until the residue was ascertained and the trust invested, the court was not authorized to make the order. Held further (by Lord, J., Thayer, C. J., concurring), that the duty to pay debts and legacies was strictly executorial, and that when this was done, and the property taken on trust for the purposes specified, the executors became trustees exclusively, and the jurisdiction thereafter was in equity.** — *Id.*

4. CONSTRUCTION — INTENTION OF TESTATOR. — In the construction of a will, under the laws of this state, due regard must be had to the directions contained therein, and to the true interests and meaning of the testator in all matters relating thereto; and when a clause in the will provides, in general terms, for the limitation over of the devise to a second taker upon a contingent event, the intention of the testator, as indicated by all the parts of the will, must determine when and under what particular circumstances the contingency arises. — *Shadden v. Hembree*, 14.
5. CONSTRUCTION — NATURE OF ESTATE. — Where H. made his will, in which he devised his farm to his son, and certain town property to his wife, and directed that the wife should have the use, control, and management of all his property, both real and personal, during her natural life, or so long as she remained his widow, and then it should go the son, except as therein provided; and by a subsequent clause in the will it was directed that, in the event that his wife and son should both die before the son became twenty-one years of age, then that his real estate should descend to his nephew, to whom he devised it in the event mentioned, and that his personal property should be divided among the brothers and sisters of himself and wife: *held*, that the will created a life estate in the wife, remainder in the son, and a limitation in the nature of an executory devise in the nephew; and that upon the happening of the contingency upon which the limitation over to the nephew was made to depend, the title of the real property vested in him, or in his heirs in case of his death; *held further*, however, that the clause in the will creating the contingency must be construed with reference to other parts of the will; and if it appeared therefrom that it was the intention of the testator that the limitation over was only to take effect in the event of the wife and son dying within the time referred to, and of the nephew being alive to take the property at the time of the death of the wife, the will should be construed in accordance with such intention. — *Id.*
5. *Id.* — And where it appeared that the nephew died first, the wife subsequently, and that the son survived the latter, *held*, that the contingency upon which the limitation depended did not happen, that the son took the real property in fee, and upon his death, it descended to his heirs, under the laws of the state governing descents, and that the heirs of the nephew had no claim upon it. — *Id.*
6. CONSTRUCTION — NATURE OF ESTATE — CONTINGENT REMAINDER. — *Held, also*, that if the limitation over had been by way of contingent remainder, instead of executory devise, the result would have been the same; that they both depend upon a contingency which must occur before they can take effect, and that when the happening of the contingency becomes impossible, the estate in the first taker, under the will, becomes absolute. — *Id.*
7. DESCENT AND DISTRIBUTION — DESCENT OF PROPERTY TO GRANDPARENTS. — *Held, also*, under the particular circumstances of these cases, that the son having died leaving no child, wife, father, mother, sister, or brother, or issue of any sister or brother, the estate descended to his grandmother on his father's side, and his grandfather and grandmother on his mother's side, in equal shares to each. — *Id.*

WITNESSES.

1. THE ALLOWANCE OF LEADING QUESTIONS rests in the sound discretion of the trial court. — *State v. Chee Gong*, 635.
2. WHETHER A WITNESS MAY BE ASKED CONCERNING ANY SERIOUS CHARGE brought against him rests in the sound discretion of the court to allow or exclude such inquiry as the ends of justice may seem to require. — *Id.*

See DEPOSITIONS.

WRIT OF REVIEW.

See APPEALS, 1; HIGHWAYS, 5.

Esc. J. G.

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